to' " as meaning "with a continuous surface connection to" other water. *Ante,* at 2226-2227. It is unclear how the plurality reached this conclusion, though it plainly neglected to consult a dictionary. Even its preferred Webster's Second defines the term as "[l]ying near, close, *or* contiguous; neighboring; bordering on" and acknowledges that "[o]bjects are ADJACENT when they lie close to each other, but *not necessarily in actual contact.*" Webster's Second 32 (emphasis added); see also Webster's Third 26. In any event, the proper question is not how the plurality would define "adjacent," but whether the Corps' definition is reasonable.

The Corps defines "adjacent" as "bordering, contiguous, or neighboring," and specifies that "[w]etlands separated from ***806** other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.' " 33 CFR § 328.3(c) (2005). This definition is plainly reasonable, both on its face and in terms of the purposes of the Act. While wetlands that are physically separated from other waters may perform less valuable functions, this is a matter for the Corps to evaluate in its permitting decisions. We made this clear in *Riverside Bayview,* 474 U.S., at 135, n. 9, 106 S.Ct. 455-which did not impose the plurality's new requirement despite an absence of evidence that the wetland at issue had the sort of continuous surface connection required by the plurality today. See *supra,* at 2255; see also *ante,* at 2244-2245 (KENNEDY, J., concurring in judgment) (observing that the plurality's requirement is inconsistent with *Riverside Bayview*). And as the facts of No. 04-1384 demonstrate, wetland separated by a berm from adjacent tributaries may still prove important to downstream water quality. Moreover, Congress was on notice of the Corps' definition of "adjacent" when it amended the Act in 1977 and added 33 U.S.C. § 1344(g)(1). See 42 Fed.Reg. 37129 (1977).

Finally, implicitly recognizing that its approach endangers the quality of waters which Congress sought to protect, the plurality suggests that the EPA can regulate pollutants before they actually enter the "waters of the United States." *Ante,* at 2227-2228. I express no view on the merits of the plurality's reasoning, which relies heavily on a respect for lower court judgments that is conspicuously lacking earlier in its opinion, *ante,* at 2217-2219.

I do fail to understand, however, why the plurality would not similarly apply this logic to dredged and fill material. The EPA's authority over pollutants (other than dredged and fill materials) stems from the identical statutory language that gives rise to the Corps' § 404 jurisdiction. The plurality claims that there is a practical difference, asserting that dredged and fill material "does not normally wash downstream."***807** *Ante,* at 2228. While more of this material will probably stay put than is true of soluble pollutants, the very existence of words like "alluvium" and "silt" in our language, see Webster's Third 59, 2119, suggests that at least some fill makes its way downstream. See also, *e.g., United States v. Deaton,* 332 F.3d 698, 707 (C.A.4 2003) ("Any pollutant or fill material that degrades water quality in a tributary has the potential to move downstream and degrade the quality of the navigable waters themselves"). Moreover, such fill can harm the biological integrity of downstream waters even if it largely stays put upstream. The Act's purpose of protecting fish, see 33 U.S.C. § 1251(a)(2); *S.D.* ****2264*** *Warren Co., ante,* at 385-386, 126 S.Ct., at 1847-1848, could be seriously impaired by sediment in upstream waters where fish spawn, since excessive sediment can "smother bottom-dwelling invertebrates and impair fish spawning," OTA 48. See also, *e.g.,* Erman & Hawthorne, The Quantitative Importance of an Intermittent Stream in the Spawning of Rainbow Trout, 105 Transactions of the American Fisheries Society 675-681 (1976); Brief for American Rivers et al. as *Amici Curiae* 14 (observing that anadromous salmon often spawn in small, intermittent streams).

IV

While I generally agree with Parts I and II-A of Justice KENNEDY's opinion, I do not share his view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term "significant nexus" as used in *SWANCC.* To the extent that our passing use of this term has become a statutory requirement, it is categorically satisfied as to wetlands adjacent to navigable waters or their tributaries. *Riverside Bayview* and *SWANCC* together make this clear. *SWANCC's* only use of the term comes in the sentence: "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Clean Water Act] in *Riverside Bayview.*" 531 U.S., at 167, 121 S.Ct. 675. Because *Riverside*

Bayview ***808** was written to encompass "wetlands adjacent to navigable waters and their tributaries," 474 U.S., at 123, 106 S.Ct. 455, and reserved only the question of isolated waters, see *id.,* at 131-132, n. 8, 106 S.Ct. 455; see also n. 3, *supra,* its determination of the Corps' jurisdiction applies to the wetlands at issue in these cases.

Even setting aside the apparent applicability of *Riverside Bayview,* I think it clear that wetlands adjacent to tributaries of navigable waters generally have a "significant nexus" with the traditionally navigable waters downstream. Unlike the "nonnavigable, isolated, intrastate waters" in *SWANCC,* 531 U.S., at 171, 121 S.Ct. 675, these wetlands can obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the "limited" connection to traditionally navigable waters that is all the statute requires, see *id.,* at 172, 121 S.Ct. 675; 474 U.S., at 133, 106 S.Ct. 455-and disproves Justice KENNEDY's claim that my approach gives no meaning to the word " 'navigable,' " *ante,* at 2247 (opinion concurring in judgment). Similarly, these wetlands can preserve downstream water quality by trapping sediment, filtering toxic pollutants, protecting fish-spawning grounds, and so forth. While there may exist categories of wetlands adjacent to tributaries of traditionally navigable waters that, taken cumulatively, have no plausibly discernible relationship to any aspect of downstream water quality, I am skeptical. And even given Justice KENNEDY's "significant-nexus" test, in the absence of compelling evidence that many such categories do exist I see no reason to conclude that the Corps' longstanding regulations are overbroad.

Justice KENNEDY's "significant-nexus" test will probably not do much to diminish the number of wetlands covered by the Act in the long run. Justice KENNEDY himself recognizes that the records in both cases contain evidence that "should permit the establishment of a significant nexus," ***809** *ante,* at 2250; see also *ibid.,* and it seems likely that evidence would support similar findings as to most (if not all) wetlands adjacent to tributaries of navigable waters. But Justice KENNEDY's approach will have the effect of creating additional work for all concerned ****2265** parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get § 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications. These problems are precisely the ones that *Riverside Bayview's* deferential approach avoided. See 474 U.S., at 135, n. 9, 106 S.Ct. 455 (noting that it "is of little moment" if the Corps' jurisdiction encompasses some wetlands "not significantly intertwined" with other waters of the United States). Unlike Justice KENNEDY, I see no reason to change *Riverside Bayview's* approach-and every reason to continue to defer to the Executive's sensible, bright-line rule.

V

As I explained in *SWANCC,* Congress passed the Clean Water Act in response to widespread recognition-based on events like the 1969 burning of the Cuyahoga River in Cleveland-that our waters had become appallingly polluted. 531 U.S., at 174-175, 121 S.Ct. 675 (dissenting opinion). The Act has largely succeeded in restoring the quality of our Nation's waters. Where the Cuyahoga River was once coated with industrial waste, "[t]oday, that location is lined with restaurants and pleasure boat slips." EPA, A Benefits Assessment of the Water Pollution Control Programs Since 1972, p. 1-2 (Jan. 2000), http://www. epa. gov/ ost/economics/assessment.pdf. By curtailing the Corps' jurisdiction of more than 30 years, the plurality needlessly jeopardizes the quality of our waters. In doing so, the plurality disregards the deference it owes ***810** the Executive, the congressional acquiescence in the Executive's position that we recognized in *Riverside Bayview,* and its own obligation to interpret laws rather than to make them. While Justice KENNEDY's approach has far fewer faults, nonetheless it also fails to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act.

I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand. I close, however, by noting an unusual feature of the Court's judgments in these cases. It has been our practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate. That

prior practice has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views.[FN13] In these cases, however, while both the plurality and Justice KENNEDY agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases-and in all other cases in which either the plurality's or Justice KENNEDY's test is satisfied-on remand each of the judgments should be reinstated if *either* of those tests is met.[FN14]

FN13. See, *e.g.*, *Screws v. United States*, 325 U.S. 91, 131-134, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (Rutledge, J., concurring in result); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 674, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (STEVENS, J., concurring in part and concurring in judgment); *Hamdi v. Rumsfeld*, 542 U.S. 507, 553-554, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (SOUTER, J., concurring in part, dissenting in part, and concurring in judgment).

FN14. I assume that Justice KENNEDY's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but Justice KENNEDY's is not, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.

****2266** Justice BREYER, dissenting.

***811** In my view, the authority of the Army Corps of Engineers under the Clean Water Act extends to the limits of congressional power to regulate interstate commerce. See *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 181-182, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) *(SWANCC)* (STEVENS, J., dissenting). I therefore have no difficulty finding that the wetlands at issue in these cases are within the Corps' jurisdiction, and I join Justice STEVENS' dissenting opinion.

My view of the statute rests in part upon the nature of the problem. The statute seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Those waters are so various and so intricately interconnected that Congress might well have decided the only way to achieve this goal is to write a statute that defines "waters" broadly and to leave the enforcing agency with the task of restricting the scope of that definition, either wholesale through regulation or retail through development permissions. That is why I believe that Congress, in using the term "waters of the United States," § 1362(7), intended fully to exercise its relevant Commerce Clause powers.

I mention this because the Court, contrary to my view, has written a "nexus" requirement into the statute. *SWANCC, supra,* at 167, 121 S.Ct. 675; *ante,* at 2248 (KENNEDY, J., concurring in judgment) ("[T]he Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense"). But it has left the administrative powers of the Army Corps of Engineers untouched. That agency may write regulations defining the term-something that it has not yet done. And the courts must give those regulations appropriate deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments***812** that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended. Hence I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.

U.S.,2006.
Rapanos v. U.S.
547 U.S. 715, 126 S.Ct. 2208, 62 ERC 1481, 165 L.Ed.2d 159, 74 USLW 4365, 36 Envtl. L. Rep. 20,116, 06 Cal. Daily Op. Serv. 5260, 2006 Daily Journal D.A.R. 7661, 19 Fla. L. Weekly Fed. S 275

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547 U.S. 715, 126 S.Ct. 2208, 62 ERC 1481, 165 L.Ed.2d 159, 74 USLW 4365, 36 Envtl. L. Rep. 20,116, 06 Cal. Daily Op. Serv. 5260, 2006 Daily Journal D.A.R. 7661, 19 Fla. L. Weekly Fed. S 275

531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576, 69 USLW 4048, 51 ERC 1833, 31 Envtl. L. Rep. 20,382, 01 Cal. Daily Op. Serv. 269, 2001 Daily Journal D.A.R. 267, 2001 CJ C.A.R. 346, 14 Fla. L. Weekly Fed. S 48
(Cite as: 531 U.S. 159, 121 S.Ct. 675)

Supreme Court of the United States
SOLID WASTE AGENCY OF NORTHERN COOK COUNTY, Petitioner,
v.
UNITED STATES ARMY CORPS OF ENGINEERS, et al.
No. 99-1178.

Argued Oct. 31, 2000.
Decided Jan. 9, 2001.

Consortium of municipalities sued the United States Army Corps of Engineers, challenging Corps' exercise of jurisdiction over abandoned sand and gravel pit on which consortium planned to develop disposal site for nonhazardous solid waste and denial of a Clean Water Act (CWA) permit for that purpose. The United States District Court for the Northern District of Illinois, George W. Lindberg, J., 998 F.Supp. 946, granted summary judgment for Corps on jurisdictional issue, and consortium voluntarily dismissed remainder of its claims. Consortium appealed. The Court of Appeals for the Seventh Circuit, 191 F.3d 845, affirmed. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that Corps' rule extending definition of "navigable waters" under CWA to include intrastate waters used as habitat by migratory birds exceeded authority granted to Corps under CWA.

Reversed.

Justice Stevens filed dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined.

****676** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioner, a consortium of suburban Chicago municipalities, selected as a solid waste disposal site an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds. Because the operation called for filling in some of the ponds, petitioner contacted federal respondents, including the Army Corps of Engineers (Corps), to determine if a landfill permit was required under § 404(a) of the Clean Water Act (CWA), which authorizes the Corps to issue permits allowing the discharge of dredged or fill material into "navigable waters." The CWA defines "navigable waters" as "the waters of the United States," 33 U.S.C. § 1362(7), and the Corps' regulations define such waters to include intrastate waters, "the use, degradation or destruction of which could affect interstate or foreign commerce," 33 CFR § 328.3(a)(3). In 1986, the Corps attempted to clarify its jurisdiction, stating, in what has been dubbed the "Migratory Bird Rule," that § 404(a) extends to intrastate waters that, *inter alia,* provide habitat for migratory birds. 51 Fed.Reg. 41217. Asserting jurisdiction over the instant site pursuant to that Rule, the Corps refused to issue a § 404(a) permit. When petitioner challenged the Corps' jurisdiction and the merits of the permit denial, the District Court granted respondents summary judgment on the jurisdictional issue. The Seventh Circuit held that Congress has authority under the Commerce Clause to regulate intrastate waters and that the Migratory Bird Rule is a reasonable interpretation of the CWA.

Held: Title 33 CFR § 328.3(a)(3), as clarified and applied to petitioner's site pursuant to the Migratory Bird Rule, exceeds the authority granted to respondents under § 404(a) of the CWA. Pp. 679-684.

(a) In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419, this Court held that the Corps had § 404(a) jurisdiction over wetlands adjacent to a navigable waterway, noting that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under [that term's] classical understanding," *id.*, at 133, 106 S.Ct. 455. But that holding was based in large measure upon Congress' unequivocal acquiescence to, and ***160** approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See *id.*, at 135-139, 106 S.Ct. 455. The Court expressed no opinion on the question of the Corps' authority to regulate wetlands not adjacent to open water, and the statute's text will not allow extension of the Corps' jurisdiction to such wetlands here. P. 680.

(b) The Corps' *original* interpretation of the CWA in its 1974 regulations-- which emphasized that a water body's capability of use by the public for transportation or commerce determines whether it is navigable--is inconsistent with that which it espouses here, yet respondents present no persuasive evidence

that the Corps mistook Congress' intent in 1974. Respondents contend that whatever its original aim, when Congress amended the CWA in 1977, it approved the more expansive definition of "navigable waters" found in the Corps' 1977 regulations. Specifically, respondents submit that Congress' failure to pass legislation that would have overturned the 1977 regulations and the extension of the Environmental Protection Agency's jurisdiction in § 404(g) to include waters "other than" traditional "navigable ****677** waters" indicates that Congress recognized and accepted a broad definition of "navigable waters" that includes nonnavigable, isolated, intrastate waters. This Court recognizes congressional acquiescence to administrative interpretations of a statute with extreme care. Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119, because a bill can be proposed or rejected for any number of reasons. Here, respondents have failed to make the necessary showing that Congress' failure to pass legislation demonstrates acquiescence to the 1977 regulations or the 1986 Migratory Bird Rule. Section 404(g) is equally unenlightening, for it does not conclusively determine the construction to be placed on the use of the term "waters" elsewhere in the CWA. *Riverside Bayview Homes, supra,* at 138, n. 11, 106 S.Ct. 455. Pp. 680-683.

(c) Even if § 404(a) were not clear, this Court would not extend deference to the Migratory Bird Rule under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694. Where an administrative interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645. The grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See, *e.g., United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658. Respondents' arguments, *e.g.*, that the Migratory Bird Rule falls within Congress' power to regulate intrastate ***161** activities that substantially affect interstate commerce, raise significant constitutional questions, yet there is nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as the one at issue. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the Migratory Bird Rule would also result in a significant impingement of the States' traditional and primary power over land and water use. The Court thus reads the statute as written to avoid such significant constitutional and federalism questions and rejects the request for administrative deference. Pp. 683-684.

191 F.3d 845, reversed.

REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post,* p. 684.

Timothy S. Bishop, Chicago, IL, for petitioner.

Lawrence G. Wallace, Washington, DC, for respondents.

***162** Chief Justice REHNQUIST delivered the opinion of the Court.

Section 404(a) of the Clean Water Act (CWA or Act), 86 Stat. 884, as amended, 33 U.S.C. § 1344(a), regulates the discharge of dredged or fill material into "navigable waters." The United States Army Corps of Engineers (Corps) has interpreted § 404(a) to confer federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds. We are asked to decide whether the provisions of § 404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce ****678** Clause, U.S. Const., Art. I, § 8, cl. 3. We answer the first question in the negative and therefore do not reach the second.

Petitioner, the Solid Waste Agency of Northern Cook County (SWANCC), is a consortium of 23 suburban Chicago ***163** cities and villages that united in an effort to locate and develop a disposal site for baled nonhazardous solid waste. The Chicago Gravel Company informed the municipalities of the availability of a 533-acre parcel, bestriding the Illinois counties Cook and Kane, which had been the site of a sand and gravel pit mining operation for three decades up until about 1960. Long since

abandoned, the old mining site eventually gave way to a successional stage forest, with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet).

The municipalities decided to purchase the site for disposal of their baled nonhazardous solid waste. By law, SWANCC was required to file for various permits from Cook County and the State of Illinois before it could begin operation of its balefill project. In addition, because the operation called for the filling of some of the permanent and seasonal ponds, SWANCC contacted federal respondents (hereinafter respondents), including the Corps, to determine if a federal landfill permit was required under § 404(a) of the CWA, 33 U.S.C. § 1344(a).

Section 404(a) grants the Corps authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Ibid.* The term "navigable waters" is defined under the Act as "the waters of the United States, including the territorial seas." § 1362(7). The Corps has issued regulations defining the term "waters of the United States" to include

> "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce ...." 33 CFR § 328.3(a)(3) (1999).

***164** In 1986, in an attempt to "clarify" the reach of its jurisdiction, the Corps stated that § 404(a) extends to intrastate waters:

> "a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
> "b. Which are or would be used as habitat by other migratory birds which cross state lines; or
> "c. Which are or would be used as habitat for endangered species; or
> "d. Used to irrigate crops sold in interstate commerce." 51 Fed.Reg. 41217.

This last promulgation has been dubbed the "Migratory Bird Rule." [FN1]

> FN1. The Corps issued the "Migratory Bird Rule" without following the notice and comment procedures outlined in the Administrative Procedure Act, 5 U.S.C. § 553.

The Corps initially concluded that it had no jurisdiction over the site because it contained no "wetlands," or areas which support "vegetation typically adapted for life in saturated soil conditions," 33 CFR § 328.3(b) (1999). However, after the Illinois Nature Preserves Commission informed the Corps that a number of migratory bird species had been observed at the site, the Corps reconsidered and ultimately asserted jurisdiction over the balefill site pursuant to subpart (b) of the "Migratory Bird Rule." The Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements. Thus, on November 16, 1987, the Corps formally "determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, ****679** while not wetlands, did qualify as 'waters of the United States' ... based upon the following criteria: (1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas ***165** are used as habitat by migratory bird *[sic]* which cross state lines." U.S. Army Corps of Engineers, Chicago District, Dept. of Army Permit Evaluation and Decision Document, Lodging of Petitioner, Tab No. 1, p. 6.

During the application process, SWANCC made several proposals to mitigate the likely displacement of the migratory birds and to preserve a great blue heron rookery located on the site. Its balefill project ultimately received the necessary local and state approval. By 1993, SWANCC had received a special use planned development permit from the Cook County Board of Appeals, a landfill development permit from the Illinois Environmental Protection Agency, and approval from the Illinois Department of Conservation.

Despite SWANCC's securing the required water quality certification from the Illinois Environmental Protection Agency, the Corps refused to issue a § 404(a) permit. The Corps found that SWANCC had not established that its proposal was the "least environmentally damaging, most practicable alternative" for disposal of nonhazardous solid waste; that SWANCC's failure to set aside sufficient funds to remediate leaks posed an "unacceptable risk to the public's drinking water supply"; and that the impact of the project upon area-sensitive species was "unmitigatable since a landfill surface cannot be

redeveloped into a forested habitat." *Id.,* at 87.

Petitioner filed suit under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.,* in the Northern District of Illinois challenging both the Corps' jurisdiction over the site and the merits of its denial of the § 404(a) permit. The District Court granted summary judgment to respondents on the jurisdictional issue, and petitioner abandoned its challenge to the Corps' permit decision. On appeal to the Court of Appeals for the Seventh Circuit, petitioner renewed its attack on respondents' use of the "Migratory Bird Rule" to assert jurisdiction over the site. Petitioner argued that respondents had exceeded their statutory authority in interpreting ***166** the CWA to cover nonnavigable, isolated, intrastate waters based upon the presence of migratory birds and, in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction.

The Court of Appeals began its analysis with the constitutional question, holding that Congress has the authority to regulate such waters based upon "the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." 191 F.3d 845, 850 (C.A.7 1999). The aggregate effect of the "destruction of the natural habitat of migratory birds" on interstate commerce, the court held, was substantial because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds. [FN2] *Ibid.* The Court of Appeals then turned to the regulatory question. The court held that the CWA reaches as many waters as the Commerce Clause allows and, given its earlier Commerce Clause ruling, it therefore followed that respondents' "Migratory ****680** Bird Rule" was a reasonable interpretation of the Act. See *id.,* at 851-852.

> FN2. Relying upon its earlier decision in *Hoffman Homes, Inc. v. EPA,* 999 F.2d 256 (C.A.7 1993), and a report from the United States Census Bureau, the Court of Appeals found that in 1996 approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds (with 11 percent crossing state lines to do so) as another 17.7 million Americans observed migratory birds (with 9.5 million traveling for the purpose of observing shorebirds). See 191 F.3d, at 850.

We granted certiorari, 529 U.S. 1129, 120 S.Ct. 2003, 146 L.Ed.2d 954 (2000), and now reverse.

Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In so doing, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of ***167** States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." § 1251(b). Relevant here, § 404(a) authorizes respondents to regulate the discharge of fill material into "navigable waters," 33 U.S.C. § 1344(a), which the statute defines as "the waters of the United States, including the territorial seas," § 1362(7). Respondents have interpreted these words to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the "Migratory Bird Rule" is not fairly supported by the CWA.

This is not the first time we have been called upon to evaluate the meaning of § 404(a). In *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), we held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.,* at 133, 106 S.Ct. 455. But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See *id.,* at 135-139, 106 S.Ct. 455. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." *Id.,* at 134, 106 S.Ct. 455.

It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes.* Indeed, we did not "express any opinion" on the "question of the

authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water ...." ***168** *Id.*, at 131-132, n. 8, 106 S.Ct. 455. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

Indeed, the Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined § 404(a)'s "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR § 209.120(d)(1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." § 209.260(e)(1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974. [FN3]

> FN3. Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 92- 1236, p. 144 (1972), U.S.Code Cong. & Admin.News 1972 pp. 3668, 3822, neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation. Indeed, respondents admit that the legislative history is somewhat ambiguous. See Brief for Federal Respondents 24.

****681** Respondents next contend that whatever its original aim in 1972, Congress charted a new course five years later when it approved the more expansive definition of "navigable waters" found in the Corps' 1977 regulations. In July 1977, the Corps formally adopted 33 CFR § 323.2(a)(5) (1978), which defined "waters of the United States" to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect ***169** interstate commerce." Respondents argue that Congress was aware of this more expansive interpretation during its 1977 amendments to the CWA. Specifically, respondents point to a failed House bill, H.R. 3199, that would have defined "navigable waters" as "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." 123 Cong. Rec. 10420, 10434 (1977). [FN4] They also point to the passage in § 404(g)(1) that authorizes a State to apply to the Environmental Protection Agency for permission "to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce ..., including wetlands adjacent thereto) within its jurisdiction ...." 33 U.S.C. § 1344(g)(1). The failure to pass legislation that would have overturned the Corps' 1977 regulations and the extension of jurisdiction in § 404(g) to waters "other than" traditional "navigable waters," respondents submit, indicate that Congress recognized and accepted a broad definition of "navigable waters" that includes nonnavigable, isolated, intrastate waters.

> FN4. While this bill passed in the House, a similarly worded amendment to a bill originating in the Senate, S.1952, failed. See 123 Cong. Rec. 26710, 26728 (1977).

[1][2] Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care. [FN5] "[F]ailed legislative ***170** proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.' " *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990)). A bill can be proposed for any number of reasons, and it can be rejected for just as many others. The relationship between the actions and inactions of the 95th Congress and the intent of the 92d ****682** Congress in passing § 404(a) is also considerably attenuated. Because "subsequent history is less

illuminating than the contemporaneous evidence," *Hagen v. Utah,* 510 U.S. 399, 420, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), respondents face a difficult task in overcoming the plain text and import of § 404(a).

> FN5. In *Bob Jones Univ. v. United States,* 461 U.S. 574, 595, 600- 601, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), for example, we upheld an Internal Revenue Service (IRS) Revenue Ruling that revoked the tax-exempt status of private schools practicing racial discrimination because the IRS' interpretation of the relevant statutes was "correct"; because Congress had held "hearings on this precise issue," making it "hardly conceivable that Congress--and in this setting, any Member of Congress--was not abundantly aware of what was going on"; and because "no fewer than 13 bills introduced to overturn the IRS interpretation" had failed. Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation. See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 118, n. 13, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) ("[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment").

We conclude that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence to the Corps' regulations or the "Migratory Bird Rule," which, of course, did not first appear until 1986. Although respondents cite some legislative history showing Congress' recognition of the Corps' assertion of jurisdiction over "isolated waters," [FN6] as we explained in *Riverside Bayview Homes,* "[i]n both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation." 474 U.S., at 136, 106 S.Ct. 455. Beyond Congress' desire to regulate ***171** wetlands adjacent to "navigable waters," respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.

> FN6. Respondents cite, for example, the Senate Report on S.1952, which referred to the Corps' "isolated waters" regulation. See S.Rep. No. 95-370, p. 75 (1977), U.S.Code Cong. & Admin.News 1977 pp. 4326, 4400. However, the same report reiterated that "[t]he committee amendment does not redefine navigable waters." *Ibid.*

Section 404(g) is equally unenlightening. In *Riverside Bayview Homes* we recognized that Congress intended the phrase "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.,* at 133, 106 S.Ct. 455. But § 404(g) gives no intimation of what those waters might be; it simply refers to them as "other ... waters." Respondents conjecture that "other ... waters" must incorporate the Corps' 1977 regulations, but it is also plausible, as petitioner contends, that Congress simply wanted to include all waters adjacent to "navigable waters," such as nonnavigable tributaries and streams. The exact meaning of § 404(g) is not before us and we express no opinion on it, but for present purposes it is sufficient to say, as we did in *Riverside Bayview Homes,* that " § 404(g)(1) does not conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of 'navigable waters') ...." *Id.,* at 138, n. 11, 106 S.Ct. 455. [FN7]

> FN7. Respondents also make a passing reference to Congress' decision in 1977 to exempt certain types of discharges from § 404(a), including, for example, "discharge of dredged or fill material ... for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches." § 67, 91 Stat. 1600, 33 U.S.C. § 1344(f)(C). As § 404(a) only regulates dredged or fill material that is discharged "into navigable waters," Congress' decision to exempt certain types of these discharges does not affect, much less address, the definition of "navigable waters."

[3] We thus decline respondents' invitation to take

what they see as the next ineluctable step after *Riverside Bayview Homes:* holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of "navigable waters" because they serve ***172** as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significance." Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the ****683** statute was of "limited import" 474 U.S., at 133, 106 S.Ct. 455, and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, *e.g., United States v. Appalachian Elec. Power Co.,* 311 U.S. 377, 407-408, 61 S.Ct. 291, 85 L.Ed. 243 (1940).

[4] Respondents--relying upon all of the arguments addressed above--contend that, at the very least, it must be said that Congress did not address the precise question of § 404(a)'s scope with regard to nonnavigable, isolated, intrastate waters, and that, therefore, we should give deference to the "Migratory Bird Rule." See, *e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We find § 404(a) to be clear, but even were we to agree with respondents, we would not extend *Chevron* deference here.

[5][6][7] Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a ***173** statute to push the limit of congressional authority. See *ibid.* This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. See *United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo, supra,* at 575, 108 S.Ct. 1392.

Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000); *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). Respondents argue that the "Migratory Bird Rule" falls within Congress' power to regulate intrastate activities that "substantially affect" interstate commerce. They note that the protection of migratory birds is a "national interest of very nearly the first magnitude," *Missouri v. Holland,* 252 U.S. 416, 435, 40 S.Ct. 382, 64 L.Ed. 641 (1920), and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam,* focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." Brief for Federal Respondents 43. But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.

***174** These are significant constitutional questions raised by respondents' application ****684** of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats

falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. See, *e.g.*, *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources ...." 33 U.S.C. § 1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference. [FN8]

FN8. Because violations of the CWA carry criminal penalties, see 33 U.S.C. § 1319(c)(2), petitioner invokes the rule of lenity as another basis for rejecting the Corps' interpretation of the CWA. Brief for Petitioner 31-32. We need not address this alternative argument. See *United States v. Shabani*, 513 U.S. 10, 17, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994).

We hold that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule," 51 Fed.Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA. The judgment of the Court of Appeals for the Seventh Circuit is therefore

Reversed.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded ***175** to that dramatic event, and to others like it, by enacting the Federal Water Pollution Control Act (FWPCA) Amendments of 1972, 86 Stat. 817, as amended, 33 U.S.C. § 1251 *et seq.*, commonly known as the Clean Water Act (Clean Water Act, CWA, or Act). [FN1] The Act proclaimed the ambitious goal of ending water pollution by 1985. § 1251(a). The Court's past interpretations of the CWA have been fully consistent with that goal. Although Congress' vision of zero pollution remains unfulfilled, its pursuit has unquestionably retarded the destruction of the aquatic environment. Our Nation's waters no longer burn. Today, however, the Court takes an unfortunate step that needlessly weakens our principal safeguard against toxic water.

FN1. See R. Adler, J. Landman, & D. Cameron, The Clean Water Act: 20 Years Later 5-10 (1993).

It is fair to characterize the Clean Water Act as "watershed" legislation. The statute endorsed fundamental changes in both the purpose and the scope of federal regulation of the Nation's waters. In § 13 of the Rivers and Harbors Appropriation Act of 1899(RHA), 30 Stat. 1152, as amended, 33 U.S.C. § 407, Congress had assigned to the Army Corps of Engineers (Corps) the mission of regulating discharges into certain waters in order to protect their use as highways for the transportation of interstate and foreign commerce; the scope of the Corps' jurisdiction under the RHA accordingly extended only to waters that were "navigable." In the CWA, however, Congress broadened the Corps' mission to include the purpose of protecting the quality of our Nation's waters for esthetic, health, recreational, and environmental uses. The scope of its jurisdiction was therefore redefined to encompass all of "the waters of the United States, including the territorial seas." § 1362(7). That ****685** definition requires neither actual nor potential navigability.

The Court has previously held that the Corps' broadened jurisdiction under the CWA properly included an 80-acre ***176** parcel of low-lying marshy land that was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but which was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). [FN2] Our broad finding in *Riverside Bayview* that the 1977 Congress had acquiesced in the Corps' understanding of its jurisdiction applies equally to the 410-acre parcel at issue here. Moreover, once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute's protection to those waters or wetlands that happen to lie near a navigable stream.

FN2. See also App. to Pet. for Cert. 25a, and Brief for United States 8, n. 7, in *Riverside Bayview,* O.T.1984, No. 84-701. The District Court in *Riverside Bayview* found that there was no direct "hydrological" connection between the parcel at issue and any nearby navigable waters. App. to Pet. for Cert. in *Riverside Bayview* 25a. The wetlands characteristics of the parcel were due, not to a surface or groundwater connection to any actually navigable water, but to "poor drainage" resulting from "the Lamson soil that underlay the property." Brief for Respondent in *Riverside Bayview* 7. Nevertheless, this Court found occasional surface runoff from the property into nearby waters to constitute a meaningful connection. *Riverside Bayview,* 474 U.S., at 134, 106 S.Ct. 455; Brief for United States in *Riverside Bayview* 8, n. 7. Of course, the *ecological* connection between the wetlands and the nearby waters also played a central role in this Court's decision. *Riverside Bayview,* 474 U.S., at 134-135, 106 S.Ct. 455. Both types of connection are also present in many, and possibly most, "isolated" waters. Brief for Dr. Gene Likens et al. as *Amici Curiae* 6-22. Indeed, although the majority and petitioner both refer to the waters on petitioner's site as "isolated," *ante,* at 682-683; Brief for Petitioner 11, their role as habitat for migratory birds, birds that serve important functions in the ecosystems of other waters throughout North America, suggests that--ecologically speaking--the waters at issue in this case are anything but isolated.

In its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps' assertion of jurisdiction over all waters ***177** except for actually navigable waters, their tributaries, and wetlands adjacent to each. Its holding rests on two equally untenable premises: (1) that when Congress passed the 1972 CWA, it did not intend "to exert anything more than its commerce power over navigation," *ante,* at 680, n. 3; and (2) that in 1972 Congress drew the boundary defining the Corps' jurisdiction at the odd line on which the Court today settles.

As I shall explain, the text of the 1972 amendments affords no support for the Court's holding, and amendments Congress adopted in 1977 do support the Corps' present interpretation of its mission as extending to so-called "isolated" waters. Indeed, simple common sense cuts against the particular definition of the Corps' jurisdiction favored by the majority.

I

The significance of the FWPCA Amendments of 1972 is illuminated by a reference to the history of federal water regulation, a history that the majority largely ignores. Federal regulation of the Nation's waters began in the 19th century with efforts targeted exclusively at "promot[ing] water transportation and commerce." Kalen, Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands, 69 N.D.L.Rev. 873, 877 (1993). This goal was pursued through the various Rivers and Harbors Acts, the most comprehensive of which was the RHA of 1899. [FN3] Section 13 ****686** of the 1899 RHA, commonly known as the Refuse Act, prohibited the discharge of "refuse" into any "navigable water" or its tributaries, as well as the deposit of "refuse" on the bank of a navigable water "whereby navigation shall or may be impeded or obstructed" without first obtaining a permit from the Secretary of the Army. 30 Stat. 1152.

FN3. See also Rivers and Harbors Appropriations Act of 1896, 29 Stat. 234; River and Harbor Act of 1894, 28 Stat. 363; River and Harbor Appropriations Act of 1890, 26 Stat. 426; The River and Harbor Appropriations Act of 1886, 24 Stat. 329.

***178** During the middle of the 20th century, the goals of federal water regulation began to shift away from an exclusive focus on protecting navigability and toward a concern for preventing environmental degradation. Kalen, 69 N.D.L.Rev., at 877-879, and n. 30. This awakening of interest in the use of federal power to protect the aquatic environment was helped along by efforts to reinterpret § 13 of the RHA in order to apply its permit requirement to industrial discharges into navigable waters, even when such discharges did nothing to impede navigability. See, *e.g., United States v. Republic Steel Corp.,* 362 U.S. 482, 490-491, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960) (noting that the term "refuse" in § 13 was broad enough to include industrial waste).

[FN4] Seeds of this nascent concern with pollution control can also be found in the FWPCA, which was first enacted in 1948 and then incrementally expanded in the following years. [FN5]

> FN4. In 1970, the House Committee on Government Operations followed the Court's lead and advocated the use of § 13 as a pollution control provision. H.R.Rep. No. 91-917, pp. 14-18 (1970). President Nixon responded by issuing Executive Order No. 11574, 35 Fed.Reg. 19627 (1970) (revoked by Exec. Order No. 12553, 51 Fed.Reg. 7237 (1986)), which created the Refuse Act Permit Program. Power, The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers, 63 Va. L.Rev. 503, 512 (1977) (hereinafter Power). The program ended soon after it started, however, when a District Court, reading the language of § 13 literally, held the permit program invalid. *Ibid.;* see *Kalur v. Resor,* 335 F.Supp. 1, 9 (D.C. 1971).
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> FN5. The FWPCA of 1948 applied only to "interstate waters." § 10(e), 62 Stat. 1161. Subsequently, it was harmonized with the Rivers and Harbors Act such that--like the earlier statute--the FWPCA defined its jurisdiction with reference to "navigable waters." Pub.L. 89-753, § 211, 80 Stat. 1252. None of these early versions of the FWPCA could fairly be described as establishing a comprehensive approach to the problem, but they did contain within themselves several of the elements that would later be employed in the CWA. *Milwaukee v. Illinois,* 451 U.S. 304, 318, n. 10, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (REHNQUIST, J.) (Congress intended to do something "quite different" in the 1972 Act); 2 W. Rodgers, Environmental Law: Air and Water § 4.1, pp. 10-11 (1986) (describing the early versions of the FWPCA).

***179** The shift in the focus of federal water regulation from protecting navigability toward environmental protection reached a dramatic climax in 1972, with the passage of the CWA. The Act, which was passed as an amendment to the existing FWPCA, was universally described by its supporters as the first truly comprehensive federal water pollution legislation. The "major purpose" of the CWA was "to establish a *comprehensive* long-range policy for the elimination of water pollution." S.Rep. No. 92-414, p. 95 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1, p. 1511 (1971) (hereinafter Leg. Hist.) (emphasis added). And "[n]o Congressman's remarks on the legislation were complete without reference to [its] 'comprehensive' nature ...." *Milwaukee v. Illinois,* 451 U.S. 304, 318, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (REHNQUIST, J.). A House sponsor described the bill as "the most comprehensive and far-reaching water pollution bill we have ever drafted," 1 Leg. Hist. 369 (Rep. Mizell), and Senator Randolph, Chairman of the Committee on Public Works, stated: "It is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment." 2 *id.,* at ****687** 1269. This Court was therefore undoubtedly correct when it described the 1972 amendments as establishing "a comprehensive program for controlling and abating water pollution." *Train v. City of New York,* 420 U.S. 35, 37, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

Section 404 of the CWA resembles § 13 of the RHA, but, unlike the earlier statute, the primary purpose of which is the maintenance of navigability, § 404 was principally intended as a pollution control measure. A comparison of the contents of the RHA and the 1972 Act vividly illustrates the fundamental difference between the purposes of the two provisions. The earlier statute contains pages of detailed appropriations for improvements in specific navigation facilities, 30 Stat. 1121-1149, for studies concerning the feasibility ***180** of a canal across the Isthmus of Panama, *id.,* at 1150, and for surveys of the advisability of harbor improvements at numerous other locations, *id.,* at 1155-1161. Tellingly, § 13, which broadly prohibits the discharge of refuse into navigable waters, contains an exception for refuse "flowing from streets and sewers ... in a liquid state." *Id.,* at 1152.

The 1972 Act, in contrast, appropriated large sums of money for research and related programs for water pollution control, 86 Stat. 816-833, and for the construction of water treatment works, *id.,* at 833-844. Strikingly absent from its declaration of "goals and policy" is *any* reference to avoiding or removing

obstructions to navigation. Instead, the principal objective of the Act, as stated by Congress in § 101, was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Congress therefore directed federal agencies in § 102 to "develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters." 33 U.S.C. § 1252. The CWA commands federal agencies to give "due regard," not to the interest of unobstructed navigation, but rather to "improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife [and] recreational purposes." *Ibid.*

Because of the statute's ambitious and comprehensive goals, it was, of course, necessary to expand its jurisdictional scope. Thus, although Congress opted to carry over the traditional jurisdictional term "navigable waters" from the RHA and prior versions of the FWPCA, it broadened the *definition* of that term to encompass all "waters of the United States." § 1362(7). [FN6] Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the ***181** word "navigable" from the definition that had originally appeared in the House version of the Act. [FN7] The majority today undoes that deletion.

> FN6. The definition of "navigable water" in earlier versions of the FWPCA had made express reference to navigability. § 211, 80 Stat. 1253.
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> FN7. The version adopted by the House of Representatives defined "navigable waters" as "the navigable waters of the United States, including the territorial seas." H.R. 11896, 92d Cong., 2d Sess., § 502(8) (1971), reprinted in 1 Leg. Hist. 1069. The CWA ultimately defined "navigable waters" simply as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The Conference Report explained that the definition in § 502(7) was intended to "be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, p. 144 (1972), reprinted in 1 Leg. Hist. 327. The Court dismisses this clear assertion of legislative intent with the back of its hand. *Ante,* at 680, n. 3. The statement, it claims, "signifies that Congress intended to exert [nothing] more than its commerce power over navigation." *Ibid.*

The majority's reading drains all meaning from the conference amendment. By ****688** 1972, Congress' Commerce Clause power over "navigation" had long since been established. *The Daniel Ball,* 10 Wall. 557, 19 L.Ed. 999 (1871); *Gilman v. Philadelphia,* 3 Wall. 713, 18 L.Ed. 96 (1866); *Gibbons v. Ogden,* 9 Wheat. 1, 6 L.Ed. 23 (1824). Why should Congress intend that its assertion of federal jurisdiction be given the "broadest possible constitutional interpretation" if it did not intend to reach beyond the very heartland of its commerce power? The activities regulated by the CWA have nothing to do with Congress' "commerce power over navigation." Indeed, the goals of the 1972 statute have nothing to do with *navigation* at all.

As we recognized in *Riverside Bayview,* the interests served by the statute embrace the protection of " 'significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites' " for various species of aquatic wildlife. 474 U.S., at 134-135, 106 S.Ct. 455. For wetlands and "isolated" inland lakes, that interest ***182** is equally powerful, regardless of the proximity of the swamp or the water to a navigable stream. Nothing in the text, the stated purposes, or the legislative history of the CWA supports the conclusion that in 1972 Congress contemplated--much less commanded--the odd jurisdictional line that the Court has drawn today.

The majority accuses respondents of reading the term "navigable" out of the statute. *Ante,* at 682. But that was accomplished by Congress when it deleted the word from the § 502(7) definition. After all, it is the *definition* that is the appropriate focus of our attention. *Babbitt v. Sweet Home Chapter of Communities for Great Oregon,* 515 U.S. 687, 697-698, n. 10, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (refusing to be guided by the common-law definition of the term "take" when construing that term within the Endangered Species Act of 1973 and looking instead to the meaning of the terms contained in the definition of "take" supplied by the statute). Moreover, a proper understanding of the history of federal water pollution regulation makes clear that--even on respondents' broad reading--the presence of the word "navigable" in the statute is not inexplicable. The term was initially used in the

various Rivers and Harbors Acts because (1) at the time those statutes were first enacted, Congress' power over the Nation's waters was viewed as extending only to "water bodies that were deemed 'navigable' and therefore suitable for moving goods to or from markets," Power 513; and (2) those statutes had the primary purpose of protecting navigation. Congress' choice to employ the term "navigable waters" in the 1972 Clean Water Act simply continued nearly a century of usage. Viewed in light of the history of federal water regulation, the broad § 502(7) definition, and Congress' unambiguous instructions in the Conference Report, it is clear that the term "navigable waters" operates in the statute as a shorthand for "waters over which federal authority may properly be asserted."

***183** II

As the majority correctly notes, *ante,* at 680, when the Corps first promulgated regulations pursuant to § 404 of the 1972 Act, it construed its authority as being essentially the same as it had been under the 1899 RHA. [FN8] The reaction to those ****689** regulations in the federal courts, [FN9] in the Environmental Protection Agency (EPA), [FN10] and in Congress [FN11] convinced ***184** the Corps that the statute required it "to protect water quality to the full extent of the [C]ommerce [C]lause" and to extend federal regulation over discharges "to many areas that have never before been subject to Federal permits or to this form of water quality protection." 40 Fed.Reg. 31320 (1975).

FN8. The Corps later acknowledged that the 1974 regulations "limited the Section 404 permit program to the same waters that were being regulated under the River and Harbor Act of 1899." 42 Fed.Reg. 37123 (1977). Although refusing to defer to the Corps' *present* interpretation of the statute, *ante,* at 682-683, the majority strangely attributes some significance to the Corps' *initial* reluctance to read the 1972 Act as expanding its jurisdiction, *ante,* at 680 ("Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974"). But, stranger still, by construing the statute as extending to nonnavigable tributaries and adjacent wetlands, the majority reads the statute more broadly than the 1974 regulations that it seems willing to accept as a correct construction of the Corps' jurisdiction. As I make clear in the text, there is abundant evidence that the Corps was wrong in 1974 and that the Court is wrong today.

FN9. See, *e.g., Natural Resources Defense Council v. Callaway,* 392 F.Supp. 685, 686 (D.C. 1975); *United States v. Holland,* 373 F.Supp. 665 (M.D.Fla.1974).

FN10. In a 1974 letter to the head of the Corps, the EPA Administrator expressed his disagreement with the Corps' parsimonious view of its own jurisdiction under the CWA. Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings before the Senate Committee on Public Works, 94th Cong., 2d Sess., 349 (1976) (letter dated June 19, 1974, from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers). The EPA is the agency that generally administers the CWA, except as otherwise provided. 33 U.S.C. § 1251(d); see also 43 Op. Atty. Gen. 197 (1979) ("Congress intended to confer upon the administrator of the [EPA] the final administrative authority" to determine the reach of the term "navigable waters").

FN11. The House Committee on Government Operations noted the disagreement between the EPA and the Corps over the meaning of "navigable waters" and ultimately expressed its agreement with the EPA's broader reading of the statute. H.R.Rep. No. 93-1396, pp. 23-27 (1974).

In 1975, the Corps therefore adopted the interim regulations that we upheld in *Riverside Bayview.* As we noted in that case, the new regulations understood "the waters of the United States" to include, not only navigable waters and their tributaries, but also "nonnavigable intrastate waters whose use or misuse could affect interstate commerce." 474 U.S., at 123, 106 S.Ct. 455. The 1975 regulations provided that the new program would become effective in three phases: phase 1, which became effective immediately, encompassed the navigable waters covered by the 1974 regulation and the RHA; phase 2, effective after July 1, 1976, extended Corps jurisdiction to nonnavigable tributaries, freshwater wetlands adjacent to primary navigable waters, and

lakes; and phase 3, effective after July 1, 1977, extended Corps jurisdiction to all other waters covered under the statute, including any waters not covered by phases 1 and 2 (such as "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters") that "the District Engineer determines necessitate regulation for the protection of water quality." 40 Fed.Reg. 31325-31326 (1975). The final version of these regulations, adopted in 1977, made clear that the covered waters included "isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." [FN12]

> FN12. 42 Fed.Reg. 37127 (1977), as amended, 33 CFR § 328.3(a)(3) (1977). The so-called "migratory bird" rule, upon which the Corps based its assertion of jurisdiction in this case, is merely a specific application of the more general jurisdictional definition first adopted in the 1975 and 1977 rules. The "rule," which operates as a rule of thumb for identifying the waters that fall within the Corps' jurisdiction over phase 3 waters, first appeared in the preamble to a 1986 repromulgation of the Corps' definition of "navigable waters." 51 Fed.Reg. 41217 (1986). As the Corps stated in the preamble, this repromulgation was not intended to alter its jurisdiction in any way. *Ibid.* Instead, the Corps indicated, the migratory bird rule was enacted simply to "clarif[y]" the scope of existing jurisdictional regulations. *Ibid.*

***185** The Corps' broadened reading of its jurisdiction provoked opposition among some Members of Congress. As a result, ****690** in 1977, Congress considered a proposal that would have limited the Corps' jurisdiction under § 404 to waters that are used, or by reasonable improvement could be used, as a means to transport interstate or foreign commerce and their adjacent wetlands. H.R. 3199, 95th Cong., 1st Sess., § 16(f) (1977). A bill embodying that proposal passed the House but was defeated in the Senate. The debates demonstrate that Congress was fully aware of the Corps' understanding of the scope of its jurisdiction under the 1972 Act. We summarized these debates in our opinion in *Riverside Bayview:*

> "In both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation. See [123 Cong. Rec.], at 10426-10432 (House debate); id., at 26710-26729 (Senate debate). Proponents of a more limited § 404 jurisdiction contended that the Corps' assertion of jurisdiction over wetlands and other nonnavigable 'waters' had far exceeded what Congress had intended in enacting § 404. Opponents of the proposed changes argued that a narrower definition of 'navigable waters' for purposes of § 404 would exclude vast stretches of crucial wetlands from the Corps' jurisdiction, with detrimental effects on wetlands ecosystems, water quality, and the aquatic environment generally. The debate, particularly in the Senate, was lengthy. In the House, the debate ended with the adoption of a narrowed definition of ***186** 'waters'; but in the Senate the limiting amendment was defeated and the old definition retained. The Conference Committee adopted the Senate's approach: efforts to narrow the definition of 'waters' were abandoned; the legislation as ultimately passed, in the words of Senator Baker, 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.' " 474 U.S., at 136-137, 106 S.Ct. 455.

The net result of that extensive debate was a congressional endorsement of the position that the Corps maintains today. We explained in *Riverside Bayview:*

> "[T]he scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.' Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *Id.*, at 137, 106 S.Ct. 455.

Even if the majority were correct that Congress did not extend the Corps' jurisdiction in the 1972 CWA to reach beyond navigable waters and their

nonnavigable tributaries, Congress' rejection of the House's efforts in 1977 to cut back on the Corps' 1975 assertion of jurisdiction clearly indicates congressional acquiescence in that assertion. Indeed, our broad determination in *Riverside Bayview* that the 1977 Congress acquiesced in the very regulations at issue in this case should foreclose petitioner's present urgings to the contrary. The majority's refusal in today's decision to acknowledge the scope of our prior decision is troubling. Compare ***187** *id.*, at 136, 106 S.Ct. 455 ("Congress acquiesced in the [1975] administrative construction [of the Corps' jurisdiction]"), with *ante,* at 682 ("We conclude that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence to the Corps' regulations ..."). [FN13] ****691** Having already concluded that Congress acquiesced in the Corps' regulatory definition of its jurisdiction, the Court is wrong to reverse course today. See *Dickerson v. United States,* 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (REHNQUIST, C.J.) (" '[T]he doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some "special justification" ' ").

> FN13. The majority appears to believe that its position is consistent with *Riverside Bayview* because of that case's reservation of the question whether the Corps' jurisdiction extends to "certain wetlands not necessarily adjacent to other waters," 474 U.S., at 124, n. 2, 106 S.Ct. 455. But it is clear from the context that the question reserved by *Riverside Bayview* did not concern "isolated" *waters,* such as those at issue in this case, but rather "isolated" *wetlands.* See *id.*, at 131- 132, n. 8, 106 S.Ct. 455 ("We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water ..."). Unlike the open waters present on petitioner's site, wetlands are *lands* "that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 CFR § 328.3(b) (2000). If, as I believe, actually navigable waters lie at the very heart of Congress' commerce power and "isolated," nonnavigable waters lie closer to (but well within) the margin, "isolated wetlands," which are themselves only marginally "waters," are the most marginal category of "waters of the United States" potentially covered by the statute. It was the question of the extension of federal jurisdiction to *that* category of "waters" that the *Riverside Bayview* Court reserved. That question is not presented in this case.

More important than the 1977 bill that did not become law are the provisions that actually were included in the 1977 revisions. Instead of agreeing with those who sought to withdraw the Corps' jurisdiction over "isolated" waters, ***188** Congress opted to exempt several classes of such waters from federal control. § 67, 91 Stat. 1601, 33 U.S.C. § 1344(f). For example, the 1977 amendments expressly exclude from the Corps' regulatory power the discharge of fill material "for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches," and "for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters." *Ibid.* The specific exemption of these waters from the Corps' jurisdiction indicates that the 1977 Congress recognized that similarly "isolated" waters *not* covered by the exceptions would fall within the statute's outer limits.

In addition to the enumerated exceptions, the 1977 amendments included a new section, § 404(g), which authorized the States to administer their own permit programs over certain nonnavigable waters. Section 404(g)(1) provides, in relevant part:

> "The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce ..., including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. § 1344(g)(1).

Section 404(g)(1)'s reference to navigable waters "other than those waters which are presently used, or are susceptible to use," for transporting commerce and their adjacent wetlands appears to suggest that Congress viewed (and accepted) the Act's regulations as covering more than navigable ***189** waters in the traditional sense. The majority correctly points out that § 404(g)(1) is itself ambiguous because it does not indicate precisely how far Congress considered federal jurisdiction to extend. ****692** Ante,* at 682. But the Court ignores the provision's legislative history, which makes clear that Congress understood § 404(g)(1)--and therefore federal jurisdiction--to extend, not only to navigable waters and nonnavigable tributaries, but also to "isolated" waters, such as those at issue in this case.

The Conference Report discussing the 1977 amendments, for example, states that § 404(g) "establish[es] a process to allow the Governor of any State to administer an individual and general permit program for the discharge of dredged or fill material into *phase 2 and 3 waters* after the approval of a program by the Administrator." H.R. Conf. Rep. No. 95-830, p. 101 (1977), U.S.Code Cong. & Admin.News 1977 pp. 4326, 4476, reprinted in 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 285 (emphasis added) (hereinafter Leg. Hist. of CWA). Similarly, a Senate Report discussing the 1977 amendments explains that, under § 404(g), "the [C]orps will *continue* to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program *for phase 2 and 3 waters.*" S.Rep. No. 95-370, p. 75 (1977), U.S.Code Cong. & Admin.News 1977 pp. 4326, 4400, reprinted in 4 Leg. Hist. of CWA 708 (emphases added).

Of course, as I have already discussed, "phase 1" waters are navigable waters and their contiguous wetlands, "phase 2" waters are the "primary tributaries" of navigable waters and their adjacent wetlands, and "phase 3" waters are all other waters covered by the statute, and can include such "isolated" waters as "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." The legislative history of the 1977 amendments therefore plainly establishes that, ***190** when it enacted § 404(g), Congress believed--and desired--the Corps' jurisdiction to extend beyond just navigable waters, their tributaries, and the wetlands adjacent to each.

In dismissing the significance of § 404(g)(1), the majority quotes out of context language in the very same 1977 Senate Report that I have quoted above. *Ante,* at 682, n. 6. It is true that the Report states that "[t]he committee amendment does not *redefine* navigable waters." S.Rep. No. 95-370, at p. 75, U.S.Code Cong. & Admin.News at p. 4400, reprinted in 4 Leg. Hist. of CWA 708 (emphasis added). But the majority fails to point out that the quoted language appears in the course of an explanation of the Senate's refusal to go along with House efforts to *narrow the scope* of the Corps' CWA jurisdiction to traditionally navigable waters. Thus, the immediately preceding sentence warns that "[t]o limit the jurisdiction of the [FWPCA] with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives." [FN14] *Ibid.* The Court would do well to heed that warning.

FN14. In any event, to attach significance to the Report's statement that the committee amendments do not "redefine navigable waters," one must first accept the majority's erroneous interpretation of the 1972 Act. But the very Report upon which the majority relies states that "[t]he 1972 [FWPCA] exercised *comprehensive jurisdiction* over the *Nation's waters* to control pollution to the *fullest constitutional extent.*" S.Rep. No. 95-370, at p. 75, U.S.Code Cong. & Admin.News at p. 4400, reprinted in 4 Leg. Hist. of CWA 708 (emphases added). Even if the Court's flawed reading of the earlier statute were correct, however, the language to which the Court points does not counsel against finding congressional acquiescence in the Corps' 1975 regulations. Quite the contrary. From the perspective of the 1977 Congress, those regulations constituted the status quo that the proposed amendments sought to alter. Considering the Report's favorable references to the Corps' "continu[ing]" jurisdiction over phase 2 and 3 waters, the language concerning the failure of the amendments to "redefine navigable waters" cuts strongly against the majority's position, which instead completely excises phase 3 waters from the scope of the Act.

Ibid.

****693** The majority also places great weight, *ante,* at 682, on our statement in *Riverside Bayview* that § 404(g) "does not *conclusively***191** determine the construction to be placed on the use of the term 'waters' elsewhere in the Act,"* *474 U.S., at 138, n. 11, 106 S.Ct. 455 (emphasis added). This is simply more selective reading. In that case, we also went on to say with respect to the significance of § 404(g) that "the various provisions of the Act should be read* in pari materia." Ibid. *More-over, our ultimate conclusion in* Riverside Bayview *was that § 404(g) "suggest[s] strongly that the term 'waters' as used in the Act" supports the Corps' reading.* Ibid.

III

Although it might have appeared problematic on a "linguistic" level for the Corps to classify "lands" as "waters" in *Riverside Bayview,* 474 U.S., at 131-132, 106 S.Ct. 455, we squarely held that the agency's construction of the statute that it was charged with enforcing was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Today, however, the majority refuses to extend such deference to the same agency's construction of the same statute, see *ante,* at 682-684. This refusal is unfaithful to both *Riverside Bayview* and *Chevron.* For it is the majority's reading, not the agency's, that does violence to the scheme Congress chose to put into place.

Contrary to the Court's suggestion, the Corps' interpretation of the statute does not "encroac[h]" upon "traditional state power" over land use. *Ante,* at 683. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 587, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987). The CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 282, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

***192** It is particularly ironic for the Court to raise the specter of federalism while construing a statute that makes explicit efforts to foster local control over water regulation. Faced with calls to cut back on federal jurisdiction over water pollution, Congress rejected attempts to narrow the scope of that jurisdiction and, by incorporating § 404(g), opted instead for a scheme that encouraged States to supplant federal control with their own regulatory programs. S.Rep. No. 95-370, at p. 75, U.S.Code Cong. & Admin.News at p. 4400, reprinted in 4 Leg. Hist. of CWA 708 ("The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of *all the Nation's waters,* but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the [C]orps program in the so-called phase I waters" (emphasis added)). Because Illinois could have taken advantage of the opportunities offered to it through § 404(g), the federalism concerns to which the majority adverts are misplaced. The Corps' interpretation of the statute as extending beyond navigable waters, tributaries of navigable waters, and wetlands adjacent to each is manifestly reasonable and therefore entitled to deference.

IV

Because I am convinced that the Court's miserly construction of the statute is incorrect, I shall comment briefly on petitioner's argument that Congress is without ****694** power to prohibit it from filling any part of the 31 acres of ponds on its property in Cook County, Illinois. The Corps' exercise of its § 404 permitting power over "isolated" waters that serve as habitat for migratory birds falls well within the boundaries set by this Court's Commerce Clause jurisprudence.

In *United States v. Lopez,* 514 U.S. 549, 558-559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), this Court identified "three broad categories of activity that Congress may regulate under its commerce power": (1) channels of interstate commerce; (2) instrumentalities of interstate ***193** commerce, or persons and things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Ibid.* The migratory bird rule at issue here is properly analyzed under the third category. In order to constitute a proper exercise of Congress' power over intrastate activities that "substantially affect" interstate commerce, it is not necessary that each individual instance of the activity substantially affect commerce; it is enough that, taken in the aggregate, the *class of activities* in question has such

an effect. *Perez v. United States,* 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971) (noting that it is the "class" of regulated activities, not the individual instance, that is to be considered in the "affects" commerce analysis); see also *Hodel,* 452 U.S., at 277, 101 S.Ct. 2352; *Wickard v. Filburn,* 317 U.S. 111, 127-128, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

The activity being regulated in this case (and by the Corps' § 404 regulations in general) is the discharge of fill material into water. The Corps did not assert jurisdiction over petitioner's land simply because the waters were "used as habitat by migratory birds." It asserted jurisdiction because petitioner planned to *discharge fill* into waters "used as habitat by migratory birds." Had petitioner intended to engage in some other activity besides discharging fill (*i.e.,* had there been no activity to regulate), or, conversely, had the waters not been habitat for migratory birds (*i.e.,* had there been no basis for federal jurisdiction), the Corps would never have become involved in petitioner's use of its land. There can be no doubt that, unlike the class of activities Congress was attempting to regulate in *United States v. Morrison,* 529 U.S. 598, 613, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) ("[g]ender-motivated crimes"), and *Lopez,* 514 U.S., at 561, 514 U.S. 549 (possession of guns near school property), the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons. See V. Albrecht & B. Goode, Wetland Regulation in the Real World, Exh. 3 (Feb.1994) (demonstrating that the overwhelming majority of acreage for which § 404 ***194** permits are sought is intended for commercial, industrial, or other economic use). [FN15]

> FN15. The fact that petitioner can conceive of some people who may discharge fill for noneconomic reasons does not weaken the legitimacy of the Corps' jurisdictional claims. As we observed in *Perez v. United States,* 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971), "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Id.,* at 154, 91 S.Ct. 1357 (internal quotation marks omitted).

Moreover, no one disputes that the discharge of fill into "isolated" waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations. See, *e.g.,* 1 Secretary of the Interior, Report to Congress, The Impact of Federal Programs on Wetlands: The Lower Mississippi Alluvial Plain and the Prairie Pothole Region 79-80 (Oct.1988) (noting that "isolated," phase 3 waters "are among the most important and also [the] most threatened ecosystems in the United States" because "[t]hey are prime nesting grounds for many species of North American waterfowl ..." and provide "[u]p to 50 percent of the [U.S.] production of migratory waterfowl"). Nor does petitioner dispute that the particular waters it seeks to fill are home to many important species of ****695** migratory birds, including the second-largest breeding colony of Great Blue Herons in northeastern Illinois, App. to Pet. for Cert. 3a, and several species of waterfowl protected by international treaty and Illinois endangered species laws, Brief for Federal Respondents 7. [FN16]

> FN16. Other bird species using petitioner's site as habitat include the " 'Great Egret, Green-backed Heron, Black-crowned Night Heron, Canada Goose, Wood Duck, Mallard, Greater Yellowlegs, Belted Kingfisher, Northern Waterthrush, Louisiana Waterthrush, Swamp Sparrow, and Red-winged Blackbird.' " Brief for Petitioner 4, n. 3.

In addition to the intrinsic value of migratory birds, see *Missouri v. Holland,* 252 U.S. 416, 435, 40 S.Ct. 382, 64 L.Ed. 641 (1920) (noting the importance of migratory birds as "protectors of our forests and our crops" and as "a food supply"), it is undisputed that ***195** literally millions of people regularly participate in birdwatching and hunting and that those activities generate a host of commercial activities of great value. [FN17] The causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds is not "attenuated," *Morrison,* 529 U.S., at 612, 120 S.Ct. 1740; it is direct and concrete. Cf. *Gibbs v. Babbitt,* 214 F.3d 483, 492-493 (C.A.4 2000) ("The relationship between red wolf takings and interstate commerce is quite direct--with no red wolves, there will be no red wolf related tourism ...").

> FN17. In 1984, the U.S. Congress Office of Technology Assessment found that, in 1980, 5.3 million Americans hunted migratory birds, spending $638 million. U.S. Congress, Office of Technology

> Assessment, Wetlands: Their Use and Regulation 54 (OTA-O-206, Mar. 1984). More than 100 million Americans spent almost $14.8 billion in 1980 to watch and photograph fish and wildlife. *Ibid.* Of 17.7 million birdwatchers, 14.3 million took trips in order to observe, feed, or photograph waterfowl, and 9.5 million took trips specifically to view other water-associated birds, such as herons like those residing at petitioner's site. U.S. Dept. of Interior, U.S. Fish and Wildlife Service and U.S. Dept. of Commerce, Bureau of Census, 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 45, 90 (issued Nov. 1997).

Finally, the migratory bird rule does not blur the "distinction between what is truly national and what is truly local." *Morrison,* 529 U.S., at 617- 618, 120 S.Ct. 1740. Justice Holmes cogently observed in *Missouri v. Holland* that the protection of migratory birds is a textbook example of a *national* problem. 252 U.S., at 435, 40 S.Ct. 382, 64 L.Ed. 641 ("It is not sufficient to rely upon the States [to protect migratory birds]. The reliance is vain ..."). The destruction of aquatic migratory bird habitat, like so many other environmental problems, is an action in which the benefits (*e.g.,* a new landfill) are disproportionately local, while many of the costs (*e.g.,* fewer migratory birds) are widely dispersed and often borne by citizens living in other States. In such situations, described by economists as involving "externalities," federal regulation is both appropriate and necessary. Revesz, ***196**Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U.L.Rev. 1210, 1222 (1992) ("The presence of interstate externalities is a powerful reason for intervention at the federal level"); cf. *Hodel,* 452 U.S., at 281-282, 101 S.Ct. 2352 (deferring to Congress' finding that nationwide standards were "essential" in order to avoid "destructive interstate competition" that might undermine environmental standards). Identifying the Corps' jurisdiction by reference to waters that serve as habitat for birds that migrate over state lines also satisfies this Court's expressed desire for some "jurisdictional element" that limits federal activity to its proper scope. *Morrison,* 529 U.S., at 612, 120 S.Ct. 1740.

The power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce. Cf. ****696***Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 953, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982) (holding water to be an "article of commerce"). Migratory birds, and the waters on which they rely, are such resources. Moreover, the protection of migratory birds is a well-established federal responsibility. As Justice Holmes noted in *Missouri v. Holland,* the federal interest in protecting these birds is of "the first magnitude." 252 U.S., at 435, 40 S.Ct. 382. Because of their transitory nature, they "can be protected only by national action." *Ibid.*

Whether it is necessary or appropriate to refuse to allow petitioner to fill those ponds is a question on which we have no voice. Whether the Federal Government has the power to require such permission, however, is a question that is easily answered. If, as it does, the Commerce Clause empowers Congress to regulate particular "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State," *Hodel,* 452 U.S., at 282, 101 S.Ct. 2352, it also empowers Congress to control individual actions that, in the aggregate, would have the same effect. ***197** *Perez,* 402 U.S., at 154, 91 S.Ct. 1357; *Wickard,* 317 U.S., at 127-128, 63 S.Ct. 82. [FN18] There is no merit in petitioner's constitutional argument.

> FN18. Justice THOMAS is the only Member of the Court who has expressed disagreement with the "aggregation principle." *United States v. Lopez,* 514 U.S. 549, 600, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (concurring opinion).

Because I would affirm the judgment of the Court of Appeals, I respectfully dissent.

Message

From: Fuld, John [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EA505C8DD1DB43D1BCDDB800B2D0E300-FULD, JOHN]
Sent: 6/7/2017 5:02:04 PM
To: Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]
CC: Bravo, Antonio [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8bcc8340b32c49888b4ec35177a70aa6-ABravo]; Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]
Subject: RE: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Marked in yellow ….can someone fix this so it is readable.

Thanks

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Subject: FW: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Please see our response to the reporter below. Bottom line is that the OFR had made a mistake in the CFR and so is doing a simple correction and this has nothing to do with the EPA/Army rulemaking.

Mindy Eisenberg
Acting Director, Oceans, Wetlands & Communities Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

From: Wendelowski, Karyn
Sent: Wednesday, June 07, 2017 12:45 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: Fw: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Here you go:

1. Can you provide the specific language for the definition being removed?

40 C.F.R 232.2 inadvertently contains both the prior definition of "waters of the United States" and the definition promulgated in the 2015 Clean Water Rule. It currently reads:

Waters of the United States means:

All waters which are currently used,

were used in the past, or may be susceptible

to us in interstate or foreign

commerce, including all waters which

are subject to the ebb and flow of the

tide.

All interstate waters including interstate

wetlands.

All other waters, such as intrastate

lakes, rivers, streams (including intermittent

streams), mudflats, sandflats,

wetlands, sloughs, prairie potholes, wet

meadows, playa lakes, or natural

ponds, the use, degradation, or destruction

of which would or could affect

interstate or foreign commerce including

any such waters:

Which are or could be used by interstate

or foreign travelers for recreational

or other purposes; or

From which fish or shellfish are or

could be taken and sold in interstate or

foreign commerce; or

Which are used or could be used for

industrial purposes by industries in

interstate commerce.

All impoundments of waters otherwise

defined as waters of the United

States under this definition;

Tributaries of waters identified in

paragraphs (g)(1)–(4) of this section;

The territorial sea; and

Wetlands adjacent to waters (other

than waters that are themselves wetlands)

identified in paragraphs (q)(1)–

(6) of this section.

Waste treatment systems, including

treatment ponds or lagoons designed to

meet the requirements of the Act

(other than cooling ponds as defined in

40 CFR 123.11(m) which also meet the

criteria of this definition) are not

waters of the United States.

Waters of the United States means:

(1) For purposes of the Clean Water

Act, 33 U.S.C. 1251 et seq. and its implementing

regulations, subject to the exclusions

in paragraph (2) of this definition,

the term ''waters of the United

States'' means:

(i) All waters which are currently

used, were used in the past, or may be

susceptible to use in interstate or foreign

commerce, including all waters

which are subject to the ebb and flow

of the tide;

(ii) All interstate waters, including

interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise

identified as waters of the

United States under this section;

(v) All tributaries, as defined in paragraph

(3)(iii) of this definition, of

waters identified in paragraphs (1)(i)

through (iii) of this definition;

(vi) All waters adjacent to a water

identified in paragraphs (1)(i) through

(v) of this definition, including wetlands,

ponds, lakes, oxbows, impoundments,

and similar waters;

(vii) All waters in paragraphs

(1)(vii)(A) through (E) of this definition

where they are determined, on a casespecific

basis, to have a significant

nexus to a water identified in paragraphs

(1)(i) through (iii) of this definition.

The waters identified in each of

paragraphs (1)(vii)(A) through (E) of

this definition are similarly situated

and shall be combined, for purposes of

a significant nexus analysis, in the watershed

that drains to the nearest

water identified in paragraphs (1)(i)

through (iii) of this definition. Waters

identified in this paragraph shall not

be combined with waters identified in

paragraph (1)(vi) of this definition

when performing a significant nexus

analysis. If waters identified in this

paragraph are also an adjacent water

under paragraph (1)(vi), they are an adjacent

water and no case-specific significant

nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a

significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi) of this definition, they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean

Water Act jurisdiction remains with

EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that

are not a relocated tributary or excavated

in a tributary.

(B) Ditches with intermittent flow

that are not a relocated tributary, excavated

in a tributary, or drain wetlands.

(C) Ditches that do not flow, either

directly or through another water, into

a water identified in paragraphs (1)(i)

through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that

would revert to dry land should application

of water to that area cease;

(B) Artificial, constructed lakes and

ponds created in dry land such as farm

and stock watering ponds, irrigation

ponds, settling basins, fields flooded for

rice growing, log cleaning ponds, or

cooling ponds;

(C) Artificial reflecting pools or

swimming pools created in dry land;

(D) Small ornamental waters created

in dry land;

(E) Water-filled depressions created

in dry land incidental to mining or

construction activity, including pits

excavated for obtaining fill, sand, or

gravel that fill with water;

(F) Erosional features, including gullies,

rills, and other ephemeral features

that do not meet the definition of tributary,

non-wetland swales, and lawfully

constructed grassed waterways;

and

(G) Puddles.

(v) Groundwater, including groundwater

drained through subsurface

drainage systems.

(vi) Stormwater control features constructed

to convey, treat, or store

stormwater that are created in dry

land.

(vii) Wastewater recycling structures

constructed in dry land; detention and

retention basins built for wastewater

recycling; groundwater recharge basins;

percolation ponds built for wastewater

recycling; and water distributary

structures built for wastewater recycling.

(3) In this definition, the following

terms apply:

(i) Adjacent. The term adjacent means

bordering, contiguous, or neighboring a

water identified in paragraphs (1)(i)

through (v) of this definition, including

waters separated by constructed dikes

or barriers, natural river berms, beach

dunes, and the like. For purposes of adjacency,

an open water such as a pond

or lake includes any wetlands within or

abutting its ordinary high water mark.

Adjacency is not limited to waters located

laterally to a water identified in

paragraphs (1)(i) through (v) of this definition.

Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) Neighboring. The term neighboring means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire

water is neighboring if a portion is located
within 1,500 feet of the high tide
line or within 1,500 feet of the ordinary
high water mark of the Great Lakes.
(iii) Tributary and tributaries. The
terms tributary and tributaries each
mean a water that contributes flow, either
directly or through another water
(including an impoundment identified
in paragraph (1)(iv) of this definition),
to a water identified in paragraphs
(1)(i) through (iii) of this definition
that is characterized by the presence of
the physical indicators of a bed and
banks and an ordinary high water
mark. These physical indicators demonstrate
there is volume, frequency,
and duration of flow sufficient to create
a bed and banks and an ordinary
high water mark, and thus to qualify
as a tributary. A tributary can be a
natural, man-altered, or man-made
water and includes waters such as rivers,
streams, canals, and ditches not
excluded under paragraph (2) of this
definition. A water that otherwise
qualifies as a tributary under this definition
does not lose its status as a tributary
if, for any length, there are one
or more constructed breaks (such as
bridges, culverts, pipes, or dams), or
one or more natural breaks (such as
wetlands along the run of a stream, debris
piles, boulder fields, or a stream
that flows underground) so long as a

bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial.

Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use

as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by

strong winds such as those accompanying

a hurricane or other intense

storm.

2. What is the purpose of this? This wouldn't happen to be the first part of the "removal and replace" process, would it?

The Office of the Federal Register is simply correcting this inadvertent error and deleting the language of the prior definition which was replaced by the Clean Water Rule. This is not an action by EPA and is not part of the process the agencies are undertaking pursuant to Executive Order 13778.

From: Eisenberg, Mindy
Sent: Wednesday, June 7, 2017 12:15 PM
To: Wendelowski, Karyn
Cc: Christensen, Damaris
Subject: FW: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Hey Karyn,

Would you mind writing a response to explain the situation regarding the CFR mistake that they are correcting?

thanks

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

From: Bravo, Antonio
Sent: Wednesday, June 07, 2017 12:06 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Cc: Fuld, John <Fuld.John@epa.gov>
Subject: Fwd: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Can you help?

Sent from my iPhone

Begin forwarded message:

From: "Fuld, John" <Fuld.John@epa.gov>
Date: June 7, 2017 at 12:01:52 PM EDT
To: "Bravo, Antonio" <Bravo.Antonio@epa.gov>
Subject: FW: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Hey just to let you know this is over there…I HAVE to have this back by 1 pm. It went over at 11:17 am

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From: Fuld, John
Sent: Wednesday, June 07, 2017 11:17 AM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Office of Water

Media Inquiry

John W. Fuld, Ph.D.

U.S. Media Relations Mgr.-Water

fuld.john@epa.gov

DATE: June 7, 2017

OUTLET: Agri-Pulse

REPORTER: Steve Davies

TOPIC: WOTUS

DEADLINE: 1 pm FAST TURN AROUND

OW PROGRAM OFFICE:

PERTINENT INFORMATION:

Reporter is trying to get more information on the FR notice scheduled for publication tomorrow and copied below.

QUESTION:

1. Can you provide the specific language for the definition being removed?

2. What is the purpose of this? This wouldn't happen to be the first part of the "removal and replace" process, would it?

ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 232 404

Program Definitions; Exempt Activities Not Requiring 404 Permits

CFR Correction

In Title 40 of the Code of Federal Regulations, Parts 190 to 259, **revised as of July 1, 2016**, on page 319, in §232.2, the first definition of Waters of the United States is removed.

BILLING CODE 1301-00-D

[FR Doc. 2017-11894 Filed: 6/7/2017 8:45 am; Publication Date: 6/8/2017]

All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

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INFORMATION PUBLICLY AVAILABLE: *(LIST SOURCE WITH EACH ANSWER)*

Web-link or source material.

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ANSWERS:

John W. Fuld, Ph.D.

U.S. Media Relations Manager Office of Water
Environmental Protection Agency

1200 Constitution Ave

Washington DC 20460

Office: 202-564-8847

Personal Phone / Ex. 6

Fuld.john@epa.gov

Message

From: Wendelowski, Karyn [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=1D913E7D7397466A803149761A0BDF18-KWENDELO]
Sent: 6/7/2017 4:45:15 PM
To: Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]
CC: Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]
Subject: Fw: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Here you go:

1. Can you provide the specific language for the definition being removed?

40 C.F.R 232.2 inadvertently contains both the prior definition of "waters of the United States" and the definition promulgated in the 2015 Clean Water Rule. It currently reads:

Waters of the United States means:
All waters which are currently used,
were used in the past, or may be susceptible
to us in interstate or foreign
commerce, including all waters which
are subject to the ebb and flow of the
tide.
All interstate waters including interstate
wetlands.
All other waters, such as intrastate
lakes, rivers, streams (including intermittent
streams), mudflats, sandflats,
wetlands, sloughs, prairie potholes, wet
meadows, playa lakes, or natural
ponds, the use, degradation, or destruction
of which would or could affect
interstate or foreign commerce including
any such waters:
Which are or could be used by interstate
or foreign travelers for recreational
or other purposes; or
From which fish or shellfish are or
could be taken and sold in interstate or
foreign commerce; or
Which are used or could be used for
industrial purposes by industries in
interstate commerce.
All impoundments of waters otherwise
defined as waters of the United
States under this definition;
Tributaries of waters identified in
paragraphs (g)(1)–(4) of this section;
The territorial sea; and
Wetlands adjacent to waters (other
than waters that are themselves wetlands)
identified in paragraphs (q)(1)–
(6) of this section.
Waste treatment systems, including
treatment ponds or lagoons designed to
meet the requirements of the Act
(other than cooling ponds as defined in
40 CFR 123.11(m) which also meet the
criteria of this definition) are not
waters of the United States.

Waters of the United States means:
(1) For purposes of the Clean Water
Act, 33 U.S.C. 1251 et seq. and its implementing
regulations, subject to the exclusions
in paragraph (2) of this definition,
the term "waters of the United
States" means:
(i) All waters which are currently
used, were used in the past, or may be
susceptible to use in interstate or foreign
commerce, including all waters
which are subject to the ebb and flow
of the tide;
(ii) All interstate waters, including
interstate wetlands;
(iii) The territorial seas;
(iv) All impoundments of waters otherwise
identified as waters of the
United States under this section;
(v) All tributaries, as defined in paragraph
(3)(iii) of this definition, of

waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;
(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a casespecific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.
(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.
(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.
(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.
(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.
(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.
(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi) of this definition, they are an adjacent water and no case-specific significant nexus analysis is required.
(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.
(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.
(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.
(iv) The following features:
(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
(C) Artificial reflecting pools or swimming pools created in dry land;
(D) Small ornamental waters created in dry land;
(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
(G) Puddles.
(v) Groundwater, including groundwater drained through subsurface drainage systems.
(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.
(3) In this definition, the following terms apply:
(i) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.
(ii) Neighboring. The term neighboring means:
(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide

line or within 1,500 feet of the ordinary high water mark of the Great Lakes.
(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.
(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:
(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in

a water identified in paragraphs (1)(i) through (iii) of this definition.
(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.
(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

2. What is the purpose of this? This wouldn't happen to be the first part of the "removal and replace" process, would it?

The Office of the Federal Register is simply correcting this inadvertent error and deleting the language of the prior definition which was replaced by the Clean Water Rule. This is not an action by EPA and is not part of the process the agencies are undertaking pursuant to Executive Order 13778.

From: Eisenberg, Mindy
Sent: Wednesday, June 7, 2017 12:15 PM
To: Wendelowski, Karyn
Cc: Christensen, Damaris
Subject: FW: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Hey Karyn,
Would you mind writing a response to explain the situation regarding the CFR mistake that they are correcting?

thanks

Mindy Eisenberg
Acting Director, Oceans, Wetlands & Communities Division
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Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

From: Bravo, Antonio
Sent: Wednesday, June 07, 2017 12:06 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Cc: Fuld, John <Fuld.John@epa.gov>
Subject: Fwd: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Can you help?

Sent from my iPhone

Begin forwarded message:

From: "Fuld, John" <Fuld.John@epa.gov>
Date: June 7, 2017 at 12:01:52 PM EDT
To: "Bravo, Antonio" <Bravo.Antonio@epa.gov>
Subject: FW: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Hey just to let you know this is over there...I HAVE to have this back by 1 pm. It went over at 11:17 am

---

From: Fuld, John
Sent: Wednesday, June 07, 2017 11:17 AM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: MEDIA INQUIRY - Agri-Pulse RE: WOTUS DUE 1pm TODAY

Office of Water Media Inquiry

John W. Fuld, Ph.D.
U.S. Media Relations Mgr.-Water
fuld.john@epa.gov

DATE: June 7, 2017

OUTLET: Agri-Pulse

REPORTER: Steve Davies

TOPIC: WOTUS

DEADLINE: 1 pm FAST TURN AROUND

OW PROGRAM OFFICE:

PERTINENT INFORMATION:

Reporter is trying to get more information on the FR notice scheduled for publication tomorrow and copied below.

QUESTION:

1. Can you provide the specific language for the definition being removed?

2. What is the purpose of this? This wouldn't happen to be the first part of the "removal and replace" process, would it?

ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 232 404

Program Definitions; Exempt Activities Not Requiring 404 Permits

CFR Correction

In Title 40 of the Code of Federal Regulations, Parts 190 to 259, **revised as of July 1, 2016**, on page 319, in §232.2, the first definition of Waters of the United States is removed.

BILLING CODE 1301-00-D

[FR Doc. 2017-11894 Filed: 6/7/2017 8:45 am; Publication Date: 6/8/2017]

All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

****
*

INFORMATION PUBLICLY AVAILABLE: *(LIST SOURCE WITH EACH ANSWER)*

Web-link or source material.

****
*

ANSWERS:

John W. Fuld, Ph.D.
U.S. Media Relations Manager Office of Water
Environmental Protection Agency
1200 Constitution Ave
Washington DC 20460
Office: 202-564-8847
Personal Phone / Ex. 6
Fuld.john@epa.gov

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Wehling, Carrie[Wehling.Carrie@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Wiggins, Lanelle[Wiggins.Lanelle@epa.gov]; Owens, Nicole[Owens.Nicole@epa.gov]; Hewitt, Julie[Hewitt.Julie@epa.gov]
From: Wendelowski, Karyn
Sent: Tue 6/6/2017 9:34:38 PM
Subject: Re: revised RFA language for WOTUS preamble

Deliberative Process / ACP Ex. 5

Karyn Wendelowski
Attorney Advisor
Office of General Counsel
(202) 564-5493

On Jun 6, 2017, at 4:56 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

Deliberative Process / ACP Ex. 5

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eisenberg.mindy@epa.gov

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Cc: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
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On Jun 6, 2017, at 4:28 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

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Mindy Eisenberg

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wehling.carrie@epa.gov

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I made an edit - Deliberative Process / ACP Ex. 5

Deliberative Process / ACP Ex. 5

Simma Kupchan
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From: Eisenberg, Mindy
Sent: Tuesday, June 06, 2017 3:06 PM
To: Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: revised RFA language for WOTUS preamble
Importance: High

As folks are working on the draft EA for the step 1 rule, I'd like your thoughts on this proposed language for the RFA section of the preamble Deliberative Process / ACP Ex. 5

Thanks!

Deliberative Process / ACP Ex. 5

Mindy Eisenberg

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Cc: Wehling, Carrie[Wehling.Carrie@epa.gov]; Wiggins, Lanelle[Wiggins.Lanelle@epa.gov]; Hewitt, Julie[Hewitt.Julie@epa.gov]; Nickerson, William[Nickerson.William@epa.gov]
From: Kupchan, Simma
Sent: Tue 6/6/2017 9:12:45 PM
Subject: RE: revised RFA language for WOTUS preamble

Deliberative Process / ACP Ex. 5

Simma Kupchan
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(p) 202-564-3105

From: Owens, Nicole
Sent: Tuesday, June 06, 2017 4:57 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Cc: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>; Nickerson, William <Nickerson.William@epa.gov>
Subject: RE: revised RFA language for WOTUS preamble

+ Bill

From: Eisenberg, Mindy
Sent: Tuesday, June 06, 2017 4:56 PM
To: Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Cc: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
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eisenberg.mindy@epa.gov

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Sent: Tuesday, June 06, 2017 4:54 PM
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Cc: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
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Deliberative Process / ACP Ex. 5

Deliberative Process / ACP Ex. 5

Karyn Wendelowski
Attorney Advisor
Office of General Counsel
(202) 564-5493
On Jun 6, 2017, at 4:28 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

Deliberative Process / ACP Ex. 5

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Deliberative Process / ACP Ex. 5

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wehling.carrie@epa.gov

From: Eisenberg, Mindy
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To: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
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Subject: RE: revised RFA language for WOTUS preamble

I made an edit – **Deliberative Process / ACP Ex. 5**

Deliberative Process / ACP Ex. 5

Simma Kupchan
Water Law Office
US EPA Office of General Counsel
William Jefferson Clinton Building North Room 7426Q
(p) 202-564-3105

From: Eisenberg, Mindy
Sent: Tuesday, June 06, 2017 3:06 PM
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Subject: revised RFA language for WOTUS preamble
Importance: High

As folks are working on the draft EA for the step 1 rule, I'd like your thoughts on this proposed language for the RFA section of the preamble and **Deliberative Process / ACP Ex. 5**

Thanks!

Deliberative Process / ACP Ex. 5

Deliberative Process / ACP Ex. 5

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From: Owens, Nicole
Sent: Tue 6/6/2017 8:56:43 PM
Subject: RE: revised RFA language for WOTUS preamble

+ Bill

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eisenberg.mindy@epa.gov

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Wehling, Carrie[Wehling.Carrie@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Wiggins, Lanelle[Wiggins.Lanelle@epa.gov]; Owens, Nicole[Owens.Nicole@epa.gov]; Hewitt, Julie[Hewitt.Julie@epa.gov]
From: Wendelowski, Karyn
Sent: Tue 6/6/2017 8:53:33 PM
Subject: Re: revised RFA language for WOTUS preamble

Deliberative Process / ACP Ex. 5

Karyn Wendelowski
Attorney Advisor
Office of General Counsel
(202) 564-5493

On Jun 6, 2017, at 4:28 PM, Eisenberg, Mindy <Eisenberg.Mindy@epa.gov> wrote:

Deliberative Process / ACP Ex. 5

Mindy Eisenberg
Acting Director, Oceans, Wetlands & Communities Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

From: Wehling, Carrie
Sent: Tuesday, June 06, 2017 4:28 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: revised RFA language for WOTUS preamble

Deliberative Process / ACP Ex. 5

Caroline (Carrie) Wehling
Assistant General Counsel
Water Law Office
U.S. Environmental Protection Agency
Washington DC 20004
202-564-5492
wehling.carrie@epa.gov

From: Eisenberg, Mindy
Sent: Tuesday, June 06, 2017 4:16 PM
To: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: revised RFA language for WOTUS preamble

Deliberative Process / ACP Ex. 5

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Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

From: Wehling, Carrie
Sent: Tuesday, June 06, 2017 4:14 PM
To: Kupchan, Simma <Kupchan.Simma@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: revised RFA language for WOTUS preamble

Deliberative Process / ACP Ex. 5

Caroline (Carrie) Wehling
Assistant General Counsel
Water Law Office
U.S. Environmental Protection Agency
Washington DC 20004
202-564-5492
wehling.carrie@epa.gov

From: Kupchan, Simma
Sent: Tuesday, June 06, 2017 4:03 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: revised RFA language for WOTUS preamble

I made an edit **Deliberative Process / ACP Ex. 5**

Deliberative Process / ACP Ex. 5

Simma Kupchan
Water Law Office
US EPA Office of General Counsel
William Jefferson Clinton Building North Room 7426Q
(p) 202-564-3105

From: Eisenberg, Mindy
Sent: Tuesday, June 06, 2017 3:06 PM
To: Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: revised RFA language for WOTUS preamble
Importance: High

As folks are working on the draft EA for the step 1 rule, I'd like your thoughts on this proposed language for the RFA section of the preamble and **Deliberative Process / ACP Ex. 5**

Thanks!

Deliberative Process / ACP Ex. 5

Mindy Eisenberg
Acting Director, Oceans, Wetlands & Communities Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Wiggins, Lanelle[Wiggins.Lanelle@epa.gov]; Owens, Nicole[Owens.Nicole@epa.gov]; Wendelowski, Karyn[wendelowski.karyn@epa.gov]; Hewitt, Julie[Hewitt.Julie@epa.gov]
From: Wehling, Carrie
Sent: Tue 6/6/2017 8:27:35 PM
Subject: RE: revised RFA language for WOTUS preamble

Deliberative Process / ACP Ex. 5

Caroline (Carrie) Wehling
Assistant General Counsel
Water Law Office
U.S. Environmental Protection Agency
Washington DC 20004
202-564-5492
wehling.carrie@epa.gov

From: Eisenberg, Mindy
Sent: Tuesday, June 06, 2017 4:16 PM
To: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: revised RFA language for WOTUS preamble

Deliberative Process / ACP Ex. 5

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Acting Director, Oceans, Wetlands & Communities Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

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Sent: Tuesday, June 06, 2017 4:14 PM
To: Kupchan, Simma <Kupchan.Simma@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: revised RFA language for WOTUS preamble

Deliberative Process / ACP Ex. 5

Caroline (Carrie) Wehling
Assistant General Counsel
Water Law Office
U.S. Environmental Protection Agency
Washington DC 20004
202-564-5492
wehling.carrie@epa.gov

From: Kupchan, Simma
Sent: Tuesday, June 06, 2017 4:03 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole

<Owens.Nicole@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: revised RFA language for WOTUS preamble

I made an edit - Deliberative Process / ACP Ex. 5

Simma Kupchan
Water Law Office
US EPA Office of General Counsel
William Jefferson Clinton Building North Room 7426Q
(p) 202-564-3105

From: Eisenberg, Mindy
Sent: Tuesday, June 06, 2017 3:06 PM
To: Wiggins, Lanelle <Wiggins.Lanelle@epa.gov>; Owens, Nicole <Owens.Nicole@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: revised RFA language for WOTUS preamble
Importance: High

As folks are working on the draft EA for the step 1 rule, I'd like your thoughts on this proposed language for the RFA section of the preamble and Deliberative Process / ACP Ex. 5

Thanks!

Deliberative Process / ACP Ex. 5

Mindy Eisenberg
Acting Director, Oceans, Wetlands & Communities Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

Message

From: Christensen, Damaris [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E04107C23C1043D6967754064C477A29-CHRISTENSEN, DAMARIS]
Sent: 6/6/2017 4:43:08 PM
To: Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]; Ruf, Christine [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a6d66733e5c5493087ee7f067675bc99-CRuf]
CC: Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; McDavit, Michael W. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4cb54848e7f641bf90e7cbbfedb28971-Michael W. McDavit]
Subject: RE: need brief TPS on status WOUS, for Mike Meeting with WDD Wed
Attachments: WDD Talking Points 6-6-17.docx

Here`you go. Please note that because of the tight turnaround this doesn't yet reflect review by Mindy.

Damaris and Donna

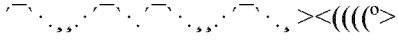
From: Eisenberg, Mindy
Sent: Tuesday, June 06, 2017 12:32 PM
To: Ruf, Christine <Ruf.Christine@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Subject: RE: need brief TPS on status WOUS, for Mike Meeting with WDD Wed

We'll provide something

Mindy Eisenberg
Acting Director, Oceans, Wetlands & Communities Division
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T
Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

From: Ruf, Christine
Sent: Tuesday, June 06, 2017 12:01 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: need brief TPS on status WOUS, for Mike Meeting with WDD Wed
Importance: High

Hi Damaris, am forwarding this request, I haven't heard back from Mindy. Could you send me something today? Thanks so much. Christine

Christine Ruf
Associate Director, Water Policy Staff
Office of Water US EPA 20460
202.566.1220
http://water.epa.gov


From: Ruf, Christine
Sent: Monday, June 05, 2017 3:42 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: brief TPS on status WOUS, for Mike Meeting with WDD Wed

HI Mindy, Mike Shapiro has his monthly meeting scheduled with the WDD this Wed to talk about Transition and other issues. We don't have a lot to update the WDD on the EO 13777 reg reform since May 17. Mike wanted to briefly update them on WOUS items. Could you /your staff send one or two pages of TPS for Mike to use by 2.30 pm tomorrow to speak from? I don't think I have the latest versions. Thanks so much. Christine

Message

From: Christensen, Damaris [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E04107C23C1043D6967754064C477A29-CHRISTENSEN, DAMARIS]
Sent: 6/6/2017 3:17:05 AM
To: Goodin, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3eac342f280a4b9db4079c81f66d1913-JGoodin]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]
CC: Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; McDavit, Michael W. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4cb54848e7f641bf90e7cbbfedb28971-Michael W. McDavit]
Subject: LGAC meeting Wednesday

(Just saw this didn't send)

I had a long conversation with Fran this morning and would like to download with you before Wednesday, but in brief what I can say in an email

1. They would appreciate a brief update, if we have anything to add from the last time. (**Deliberative Process / Ex. 5** **Deliberative Process / Ex. 5**)
2. This will be mostly a working meeting and we would be available mostly for technical assistance.
3. They hope to discuss a draft report which Fran will circulate once it's developed (**Deliberative Process / Ex. 5**
4. They are very interested in the Rapanos guidance approach (I can say more in person)

There's a subcommittee meeting of the Small Communities and Agriculture Subcommittee June 29. No invite is out yet but likely they would appreciate someone who can talk about WOTUS and agriculture – specifically PCC and pesticides. For pesticides, I'm going to see what info I have from the CWR and also see if Prasad Chumble, who works on the PGP, can attend. For PCC, maybe Donna? Tim did PCC a while ago, and handed it over to me, but we've done nothing with it in the past few years. Is there more generally a person who could bring more of the ag perspective to this discussion?

Damaris

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Smith, Bernicel
Sent: Mon 6/5/2017 1:21:41 PM
Subject: Following up on our OWCD RESEARCH NEEDS discussion
4-28-17 OWOW input on OW Research Tracker.xlsx

Good morning Mindy. I am following up on our May 31st discussion regarding any Division research needs updates to the OW Research tracker, particularly in light of John and your staff's Chat-aqua prep meeting with ORD last Thursday. Chat-aqua is a forum where a program office presents to ORD a research problem/science question(s) that need to be addressed over the next 2-3 years. This two hr. forum also provides the opportunity for ORD to react to identified research needs, including a discussion on current ORD work, any new science directions on the topic and ORD capabilities to provide assistance. A chat-aqua is tentatively planned for some time between June 19 and mid-July to address WOUS.

Specifically, **Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

During our May 31st meeting you agreed to follow up with staff on Divison research/science needs. I am attaching the OW Research tracker, that Rose updated in April. The tracker shows existing/ongoing research on lines #70-72. As I mentioned previously, we do not need to identify every ongoing OWOW-ORD collaborations on the research tracker, but rather we need to focus on new and critical priority needs.

Since John offered to have a draft Chat-aqua agenda ready for ORD's within a week of the June 1st meeting, I figured this Wednesday might be a good time to check in with you regarding any updated Division research needs, including those related to WOUS. Would you have enough time to check in with staff and then share with me any updates on research needs by this Wednesday?

Bernice

Bernice L. Smith, Ph.D.
Senior Science Advisor
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W., Rm. 7131
Washington, D.C. 20460
Phone: 202-566-1244

Message

From: Christensen, Damaris [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E04107C23C1043D6967754064C477A29-CHRISTENSEN, DAMARIS]
Sent: 6/4/2017 4:54:03 AM
To: Goodin, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3eac342f280a4b9db4079c81f66d1913-JGoodin]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]
CC: Wesson, Dolores [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=500270d34ba046f48c5d8ff54746cb81-Wesson, Dol]; Hurld, Kathy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f3b04131f1145fcb4ccf5b0a64c1ac4-KHurld]; Schaefer-Gomez, Julia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d5f0868369304bef91d8aece8386fc8c-Schaefer-Go]; Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]; Peterson, Carol [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1a897adcf3ae4e98880f850ac261471c-CPeter04]; Bennett, Brittany [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3d7b265c202c467791ca4d4ac6b8db8b-Bennett, Br]; McDavit, Michael W. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4cb54848e7f641bf90e7cbbfedb28971-Michael W. McDavit]; Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]
Subject: upcoming external meetings (or, why you will be tired this week)
Attachments: ASFPM.pdf; WGA CWR comments.pdf; CA groups incl Policylink CWR comments.pdf

John and Mindy,

Here's a list of meetings the week of 6/5. Hopefully this will be helpful.

A few points:

- Rose has draft run of shows and further info for the tribal consultation meetings on the Sharepoint site (see her email from before she left).
- We need leader, not participant, call-ins for a few of the EPA-hosted meetings – I am working on that. And it can be changed day of if need be.
- Where participants commented on the Clean Water Rule I've attached their comments, except for ACWA and ASWM, I figure you know where they are coming from.

Monday 6/5

1-1:30 E.O. 12866 requested by Lisa Barrett, PolicyLink. (A CA-based equity-and-justice association, see policylink.org)
Call-in: Nonresponsive Conference Code/ Ex. 6
Listening session only

2-2:30 E.O. 12866 requested by Don Parrish, American Farm Bureau Federation.
Call-in: Nonresponsive Conference Code/ Ex. 6
Listening session only
No comments (part of WAC)

?? E.O. 12866 requested by UWAG – I heard about this but it is not on my calendar
Call-in (presumably): Nonresponsive Conference Code/ Ex. 6
Listening session only *politicals are attending*
UWAG comments were too big to attach, you can find them here: https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15016

Tues. 6/6,

11:30-11:50 Region 6 RTOC

Call-in: Nonresponsive Conference Code/ Ex. 6

Room: Potomac Conference Room (7301) OR if new phone hasn't arrived, I've also reserved Everglades (7343) as a back-up

Webinar: slides sent in advance, this will be discussion only

Support: Damaris will take notes, open call

Presenters: Donna will give presentation

Goal/Purpose: Quick review of key points, Q&A; Tribal consultation/info session

2-3 Association of State Wetland Managers (ASWM)

DCRoomWest6300D/DC-CCW-OW-WEST

Webinar (preregistration): Nonresponsive Internal URL/ Ex. 6

Support: Kathy will be back and will presumably set up, call in – ASWM is going to be running webinar

Presenters: Mindy or John per invite

Goal/Purpose: Review powerpoint, Q&A and discussion under federalism; Described as a "listening session" in invite

Wed. 6/7

11-12 Region 4 RTOC

Call-in: Nonresponsive Conference Code/ Ex. 6

Webinar: Nonresponsive Internal URL/ Ex. 6

Room: Pacific Conference Room (7114-M)

Support: Brittany will run the webinar, Damaris will take notes

Presenter: Donna will give the presentation; Mindy has the option to give opening remarks if she wants to (or Donna can); Army/Corps also has the option to given opening remarks if they want Damaris will take notes

Goal/Purpose: Webinar and Q&A; Tribal consultation/info session

2-3 Association of State Floodplain Managers (ASFPM) and Interstate Oil and Gas Commission (IOGCC)

Webinar: Adobe Connect: Nonresponsive Internal URL/ Ex. 6

Call-in: call-in number Nonresponsive Conference Code/ Ex. 6

Support: Kathy/Julia will run webinar, Damaris will run Leaderview

Presenters: Mindy or John per invite

Materials: provided in the invitation – ASFPM comments attached, none from IOGCC

Goal/Purpose: Review powerpoint, Q&A; Described as a "listening session" in invite

4:30-5:30 LGAC

Call-in only – info on John's calendar only

Support: Fran is organizing, we call in.

Presenters: John

Goal/Purpose: This is the final call before their June 29 public meeting to discuss their recommendations, so I assume they will be discussing those recommendations and would like a general update on status as well as having John available for Q&A – but I have a call/email into Fran to make sure.

Thurs. 6/8

1-2 Western Governors Association

Webinar: Nonresponsive Internal URL/ Ex. 6

Participant Toll Free Dial-In Number: Nonresponsive Conference Code/ Ex. 6

Nonresponsive Conference Code/ Ex. 6

Support: Kathy/Julia will run webinar, Damaris will run Leaderview

Materials: sent by Roger Gorke and are embedded in the invite

Presenters: Mindy or John per invite

Goal/Purpose: Review powerpoint, Q&A; Described as a "listening session" in invite

Fri. 6/9
3-4 ACWA
Webinar: Nonresponsive Internal URL/ Ex. 6
Call-in number: Conference Number(s): [redacted]
Support: ACWA is hosting the webinar/ call - Kathy/Julia will log into webinar
Materials:
Presenters: John will review powerpoint,
Goal/Purpose: Review powerpoint and Q&A, discussion with ACWA's WOTUS workgroup; Described as a "listening session" in invite

Message

From: Somerville, Eric [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E6CC976997594F4A8E89791ACCE8B87F-SOMERVILLE, ERIC]
Sent: 6/2/2017 7:17:29 PM
To: Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]
CC: McDavit, Michael W. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4cb54848e7f641bf90e7cbbfedb28971-Michael W. McDavit]; Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]; Able, Tony [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=08873e26ccd44323b0f6ab96e0e8fada-Able, Anthony]
Subject: re-categorizing comments in Topic 17
Attachments: RtC Topic 17 recategorized comments_ES 6 2 17.xlsx

Good Afternoon Damaris-

Deliberative Process / Ex. 5

Personal Matters / Ex. 6 Let me know if I there is anything I can do.

-Eric

Eric Somerville
U.S. EPA Region 4 | Ocean, Wetlands & Streams Protection Branch
c/o SESD (F120-6) | 980 College Station Road | Athens, GA 30605-2720
tel 706.355.8514 | somerville.eric@epa.gov

From: Able, Tony
Sent: Thursday, June 01, 2017 8:57 AM
To: Somerville, Eric <Somerville.Eric@epa.gov>
Subject: FW: Support from Eric Somerville

Call me after you look this over. I'm supportive.

Tony Able, Chief
Wetlands and Streams Regulatory Section
U.S. Environmental Protection Agency
61 Forsyth St., S.W.
Atlanta, GA 30303

W - 404 562 9273

C - Personal Phone / Ex. 6

From: McDavit, Michael W.
Sent: Thursday, June 1, 2017 7:47 AM
To: Able, Tony <Able.Tony@epa.gov>
Cc: Downing, Donna <Downing.Donna@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: Support from Eric Somerville

Hi Tony,

Thanks for all your support at the national meeting. I thought it was a good meeting for us.

Now to the main reason I'm writing to you. I'd very much like assistance from Eric Somerville for a couple of WOTUS2-related projects. They are interrelated, and would both inform the Response to Comments effort. I'm in need of someone like Eric because Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

We are very grateful for the significant effort Eric has already put into the Clean Water Rule, and appreciate your willingness to let him provide further support. Please share this with Eric and then let me know if you and he are okay with this request and the time estimates. In any case, thanks so much for considering it. Crossing my fingers.

All my best,
Michael

W. Michael McDavit, Chief
Program Development and Jurisdiction Branch
Office of Water/USEPA (MC 4502T)

1200 Penn. Ave, NW (Room 7303 West Bldg)
Washington, DC 20460
202-566-2465

"Why is the sea king of a hundred streams?
Because it lies below them."
LAO TSU

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]
From: Kwok, Rose
Sent: Fri 6/2/2017 10:08:07 AM
Subject: Re: Transmittal memos
WOTUS DRAFT Action Memo 5-31-2017.docx
Memo_Transmittal_OWOW to AAA_Step 1 WOTUS_NPRM.docx

Hi John,

Here are the two memos - a transmittal for you to sign (to Mike) and the memo for Mike to sign (to the Administrator through OP)

Rose Kwok

U.S. Environmental Protection Agency

Wetlands Division

kwok.rose@epa.gov

202-566-0657, 202-566-1375 (fax)

From: Eisenberg, Mindy
Sent: Thursday, June 1, 2017 7:42:36 PM
To: Kwok, Rose
Subject: Transmittal memos

Hi Rose,
Could you please email the two memos to John so he can review?

Thanks!
Mindy

Sent from my iPhone

Message

From: Goodin, John [Goodin.John@epa.gov]
Sent: 6/1/2017 6:26:18 PM
To: Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]
Subject: FW: WOTUS rewrite to align with Scalia opinion, seek feedback from Colorado; PLF uses Congressional Review Act to challenge illegally enforced wetlands guidance

FYI

-----Original Message-----
From: Schmauder, Craig R SES (US) [mailto: Personal Matters / Ex. 6 @mail.mil]
Sent: Thursday, June 01, 2017 10:29 AM
To: Shapiro, Mike <Shapiro.Mike@epa.gov>; Peck, Gregory <Peck.Gregory@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Subject: WOTUS rewrite to align with Scalia opinion, seek feedback from Colorado; PLF uses Congressional Review Act to challenge illegally enforced wetlands guidance

FYI

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https://www.coloradostatesman.com/wotus-rewrite-align-scalia-opinion-seek-feedback-colorado/
The Colorado Statesman - Denver, CO - 5/31/17

By Adam McCoy

Federal environmental regulators are seeking "input and wisdom" from Colorado as they begin the process of rewriting a Barack Obama-era water protection rule known as WOTUS, which the White House says it now wants aligned with a Supreme Court opinion on water rights from the late Justice Antonin Scalia.

The U.S. Environmental Protection Agency under Scott Pruitt and the Army Corps of Engineers wrote a letter earlier this month to Colorado asking for written feedback on the state's "experiences and expertise" as the agencies work to redefine the Waters of the U.S. Rule (WOTUS).

WOTUS, also known as the Clean Water Rule, defines the jurisdiction of the EPA over waterways and wetlands "to restore and maintain the chemical, physical, and biological integrity of waters of the United States."

The rule is the EPA's interpretation, under the Obama administration, of the the Clean Water Act of 1972, which aimed to curtail pollutants in water. Under WOTUS, the EPA expanded what falls into the category of a federally regulated body of water. The rule previously stated only waterways that could be navigable by ships for interstate commerce were to be federally regulated, according to a Congressional Research Service analysis.

Environmentalists have praised the rule, but it has also come under fire by farmers and ranchers who label the rule federal overreach. Colorado joined a lawsuit in 2015 that called WOTUS "unreasonable federal overreach." A total of 16 states sought legal action against the rule.

A Feb. 28 executive order signed by President Donald Trump directed the EPA and Army Corps to review the rule and ensure it prioritizes that the "nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and States under the Constitution."

Now, after years of remaining in judicial limbo with court-ordered delays, the Trump administration looks to revise WOTUS.

State preparing comment

The governor's office said in a statement to The Colorado Statesman, it is in the process of developing comments in reply to the EPA.

"It is important to Colorado that a revised rule provide clarity so that projects are able to proceed efficiently, and that the rule be legally defensible," spokesperson Jacque Montgomery said. "It is also important that the rule protect the headwaters of Colorado and retain the agricultural exemptions."

U.S. Rep. Scott Tipton, R-CO3, has voiced support for the WOTUS redefining effort, urging Hickenlooper and Colorado Attorney General Cynthia Coffman to weigh in with feedback.

"We all want access to clean and reliable water supplies. This is why the Clean Water Act was signed into law in 1948 and expanded in 1972," Tipton said in a statement. "What we don't want is for unelected bureaucrats to legislate through rulemaking. This is what the EPA did with WOTUS, and Colorado responded by joining several other Western States in a lawsuit against the rule."

Coffman's office said it has not received any correspondence from the EPA or the Army Corps of Engineers.

The Scalia opinion

The letter to state officials across the country said the order will be enacted in two steps including re-codifying the Clean Water Act before WOTUS, and writing a replacement act that aligns with an opinion written by Justice Scalia in a legal challenge.

That refers to an opinion coming out of a dispute between a Michigan farmer and the EPA over development on a wetland. It was heard by the U.S. Supreme Court in 2006 and the case questioned whether the EPA has jurisdiction over bodies "that do not even have a navigable water," according to the Congressional Research Service.

In a plurality opinion written by Scalia, the justice argued the word "waters" in "Waters of the United States" refers to "relatively permanent, standing or continuously flowing bodies of water." Scalia was pointing to streams, rivers and lakes and wetlands that have a "continuous surface connection," the research service wrote.

The nation's highest court was expected to provide clarity on the EPA's jurisdiction, but instead couldn't come to a consensus on a standard.

Impact in Colorado

The Army Corps of Engineers and EPA face the challenge of how to combine the best watershed science into an effort to define federal jurisdiction that provides clarity to regulators and those facing regulations, said Reagan Waskom, director of the Colorado Water Institute.

"As scientists, we see that everything in the watershed is connected at some level, so the challenge is defining what is 'significant' in the significant nexus," he said, referring to a different Supreme Court opinion from Justice Anthony Kennedy that argued the Army Corps should judge on a case-by-case basis whether a body of water has "significant nexus," or significant impact, on a navigable water.

"We also view the landscape as highly heterogeneous and see case-by-case evaluation as the most likely approach to get it right (from a scientific point of view)," Waskom said.

He said the Scalia approach overlooks the science and "may have trouble withstanding court challenges from citizen-initiated lawsuits."

Waskom said farmers and developers deserve regulatory certainty, and know the rules when it comes to managing their land and development projects, but there won't be much impact on Colorado agriculture.

"Here in Colorado, I think agriculture would generally have been in the same position as before with the Clean Water Rule as promulgated as we do not have any of the five categories of 'isolated waters' called out for expanded jurisdiction," he said.

Government overreach versus water conservation

Farmers and ranchers have been vocal opponents of WOTUS, arguing the rule is ambiguous and its broad reach is unlawful.

Colorado Farm Bureau Executive Vice President Chad Vorthmann said his organization's members will again ask the EPA to "ditch the rule" in favor of clear, objective rule defining where the federal authority begins and ends for bodies of water.

"We hope a new rule will provide specific limits on federal jurisdiction, especially to features that are ordinarily dry like many in Colorado now regulated by EPA," Vorthmann said. "By working more cooperatively with state authorities, EPA can provide regulatory certainty to farmers and other stakeholders while allowing the flexibility necessary to achieve the goals of the Clean Water Act."

But Garrett Garner-Wells, director of state conservationist group Environment Colorado, has little faith in the EPA and Trump administration in rewriting the rule. He said to see water protections undone would be devastating.

"For more than two-thirds of Coloradans, the Clean Water Rule is a vital drinking water protection and a bulwark against pollution," Garner-Wells said. "The Clean Water rule protects more than 73,000 miles of our rivers and streams, and repealing the rule is an assault on Colorado's residents, environment, and commonsense values."

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https://blog.pacificlegal.org/plf-uses-congressional-review-act-challenge-illegally-enforced-wetlands-guidance/

By Tony Francois

Last Friday, we filed a motion in federal court in the Duarte Nursery case, asking the judge to exclude evidence based on the 2008 Post-Rapanos Guidance because it was never submitted to Congress for review under the Congressional Review Act and is therefore, under that Act, not in effect and unenforceable.

Followers of PLF's Red Tape Rollback project will be familiar with the basic concept. Under the Congressional Review Act, federal agencies are required to submit each of their rules, along with a report, to each House of Congress and the Comptroller General. Rules cannot take effect before they have been so submitted. Once a rule is submitted, Congress has a period of time in which it can use expedited procedures to disapprove the rule. If the president signs a joint resolution of disapproval, then the rule can not take effect and the agency is permanently barred from adopting a substantially similar one absent statutory approval.

In the Duarte Nursery case, the government is claiming that a series of small and isolated vernal pools and swales on the company's property are federally protected wetlands. But they are not navigable in any sense, nor do they meet the only test that the Supreme Court has approved for federal regulation of non-navigable wetlands (i.e. they are not directly abutting navigable waters in a way that you cannot tell where one ends and the other begins).

So how can the United States claim that small, isolated, and seasonal pools are really federal navigable waters? Enter the Army Corps' 2008 Rapanos Guidance. In 2006, the Supreme Court, in a case litigated by PLF, ruled against the EPA's assertion of jurisdiction over wetlands on John Rapanos' property, because they were too tenuously connected to any actually navigable waters. The EPA and Army Corps of Engineers then issued a guidance document in 2008 that purports to interpret and implement the Supreme Court's decision in Rapanos, although it stretches that decision beyond the breaking point to continue the agencies expansive view of how much of your land they can call their water.

This is the guidance document under which the United States claims that damp spots on Duarte Nursery's land are the federal navigable waters. But here's the rub: because the Rapanos Guidance was never submitted to Congress under the Review Act, it is not legally in effect.

As my PLF colleague Jonathan Wood explains in this Daily Caller op ed, the Rapanos Guidance is not only an invalid effort to expand federal authority beyond limits set by the Supreme Court. It is also a rule that the Congressional Review Act required the agencies to submit to Congress before it can take effect. And since it was not submitted, it is not in effect and cannot be relied on for enforcement or court proceedings.

****

Respectfully -- Craig
Craig R. Schmauder, SES
Deputy General Counsel
Installations, Environment & Civil Works
Personal Matters / Ex. 6

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Dorjets, Vlad EOP/OMB[EOP / Ex. 6]
Cc: Owens, Nicole[Owens.Nicole@epa.gov]; Laity, Jim A. EOP/OMB[EOP / Ex. 6]; Rees, Sarah[rees.sarah@epa.gov]
From: Kupchan, Simma
Sent: Wed 5/31/2017 3:16:38 PM
Subject: RE: Response to OMB comments on proposed Step 1 WOTUS
WOTUS Draft Proposed Rule incorporating OMB comments_5-31-2017 11.15 am.docx

Deliberative Process / Ex. 5

Thank you for your attention.

Simma Kupchan
Water Law Office
US EPA Office of General Counsel
William Jefferson Clinton Building North Room 7426Q
(p) 202-564-3105

-----Original Message-----
From: Eisenberg, Mindy
Sent: Wednesday, May 31, 2017 11:15 AM
To: Dorjets, Vlad EOP/OMB [EOP / Ex. 6]
Cc: Owens, Nicole <Owens.Nicole@epa.gov>; Laity, Jim A. EOP/OMB [EOP / Ex. 6] Rees, Sarah <rees.sarah@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>
Subject: Re: Response to OMB comments on proposed Step 1 WOTUS

Hi All,
We have one slight update that Simma Kupcham will email you right now.

Thanks!

Sent from my iPhone

> On May 31, 2017, at 10:04 AM, Dorjets, Vlad EOP/OMB <[EOP / Ex. 6]> wrote:
>
> Nicole - Thanks for sending. [Deliberative Process / Ex. 5]

Deliberative Process / Ex. 5

>
>
> -----Original Message-----
> From: Owens, Nicole [mailto:Owens.Nicole@epa.gov]
> Sent: Wednesday, May 31, 2017 9:55 AM
> To: Dorjets, Vlad EOP/OMB [EOP / Ex. 6] Laity, Jim A. EOP/OMB [EOP / Ex. 6]
> Cc: Rees, Sarah <rees.sarah@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
> Subject: Response to OMB comments on proposed Step 1 WOTUS
> Importance: High
>
> Hello Vlad and Jim -
>
>
>

> Attached is EPA's response to comments on WOTUS. Please let us know your response as soon as possible. Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

>
>
>
> Nicole
>

Message

From: Christensen, Damaris [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E04107C23C1043D6967754064C477A29-CHRISTENSEN, DAMARIS]
Sent: 5/31/2017 4:02:38 AM
To: Dennis, Allison [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9bf7959058b241fab18e564e9c957b56-ADennis]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]
Subject: WOTUS Step 1 Comms Plan 5.21.2017.docx
Attachments: WOTUS Step 1 Comms Plan 5.21.2017.docx; Script for step 1 proposal notification calls.docx

Allison,

Something I forgot to flag in my earlier email is that OPA should think about whether Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Mindy,

Do you want to attach this to the meeting invite or just have me review orally?

Damaris

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]
Cc: Kwok, Rose[Kwok.Rose@epa.gov]; Hurld, Kathy[Hurld.Kathy@epa.gov]
From: Christensen, Damaris
Sent: Fri 5/26/2017 10:19:19 PM
Subject: upcoming meetings - what to expect
tolowa dee-ni letter.pdf
wswc 3-13-14 process concerns.pdf
WSWC CWR comments.pdf
NASDA CWR comments.pdf
ECOS CWR comment.pdf

Hi all,

I spoke to Mindy this afternoon/evening and since she and John were out all week she thought it would be helpful to get a high-level look at what's coming next week. Rose and Kathy will be able to provide more details but as Rose was compressed today and Kathy's on AL I thought I'd set up an overview and they can add more details before the particular calls.

Tues. 5/30 ECOS 4-4:30

•□□□□□□□ This is a standing meeting of the ECOS Water Committee. EPA/Army/Corps were invited to join for the first half. ECOS sees this as ***their*** meeting (did not want our formal invite).

•□□□□□□□ This is a phone call only, not a webinar. ECOS was provided a powerpoint to distribute to their members as a background for discussion.

•□□□□□□□ At the beginning of the call Kathy will discuss that the call will be recorded and summarized at a very high level for the docket.

•□□□□□□□ Speaking will be Tate Bennett; Craig Schmauder; John Goodin. No Corps (too late).

Wed. 5/31 Tolowa Dee-ni' Nation 12-1

•□□□□□□□ The tribe requested staff-level consultation. Letter is attached. As far as I can tell they did not (individually) submit comments on the CWR.

•□□□□□□□ Mindy will be speaking. The Region will be on the call, and also Karen Gude. Not sure about Corps.

•□□□□□□□□ Rose did not set up a webinar so I assume it is a call only.

Wed. 5/31 NASDA 4-5

•□□□□□□□□ This is a webinar (Kathy has set up) with an operator-assisted call-in number; framed as a listening session around those call-in numbers

•□□□□□□□□ Tate Bennett was invited, also John and Mindy. No Corps (too late); I think Cindy will come. John likely to review powerpoint and lead discussion.

Thurs. 6/1 EO 12866- Clean Water Action at OMB 2-2:30

•□□□□□□□□ Call in, listening session only

Fri. 6/2 WSWC 2-3

•□□□□□□□□ Webinar plus an operator-assisted call in; also framed as listening session.

•□□□□□□□□ Tate, John and Mindy were invited. No Corps (conflict); Cindy may come. John leads powerpoint.

WESTERN GOVERNORS' ASSOCIATION

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Governor of Nevada
Chairman

John A. Kitzhaber, M.D.
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www.westgov.org

August 27, 2014

Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (1101A)
Washington, D.C. 20460

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)
108 Army Pentagon
Washington, D.C. 20310

Dear Administrator McCarthy and Assistant Secretary Darcy,

The purpose of this letter is to request an additional extension of the comment period on the proposed rule regarding the jurisdiction of the Clean Water Act (*79 FR 22187*, published April 21, 2014).

Western Governors originally requested a 180-day extension of the comment period. While we appreciate the 91-day extension of the comment period announced on June 9, the time frame remains insufficient for states to formulate thorough and thoughtful commentary on the rule's extensive impacts, effects and implications. Moreover, a significant amount of confusion and new information regarding the proposed rule has emerged over the last several weeks thus further warranting an extra 89-day extension of the comment period.

As stated in WGA's letter dated March 25, 2014, we are concerned that this proposed rulemaking could impinge upon state authority in water management. Given the potential impacts of the rule on management of water resources – a fundamental responsibility of the states – we hope you will respond favorably to our request.

In addition, our states need more time to review the streams and waterbodies and wetlands maps recently released by the Environmental Protection Agency. The additional extension of the comment period will provide states with adequate time to review these resources.

Again, we appreciate the initial extension of the comment period, as well as your accessibility to discuss the proposed rule since its publication.

With gratitude for your consideration of our request, we are

Respectfully,

Brian Sandoval
Governor, State of Nevada
WGA Chairman

John Kitzhaber
Governor, State of Oregon
WGA Vice Chairman

cc: House Transportation and Infrastructure Committee Leadership
House Natural Resources Committee Leadership
Senate Environment and Public Works Leadership
Michael Boots, Acting Chairman, Council on Environmental Quality

ECOS

THE ENVIRONMENTAL COUNCIL OF THE STATES

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Web: www.ecos.org

November 14, 2014

Mr. Ken Kopocis
Deputy Assistant Administrator for Water
United States Environmental Protection Agency
Office of Water
William Jefferson Clinton Building
1200 Pennsylvania Ave NW, MC 4101M
Washington, DC 20460

Ms. Jo Ellen Darcy
Assistant Secretary of Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon, Room 3E446
Washington, DC 20310-0108

Via email to: ow-docket@epa.gov

Re: Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA–HQ–OW–2011–0880

Dear Deputy Assistant Administrator Kopocis and Assistant Secretary Darcy:

On behalf of the Environmental Council of the States (ECOS), I submit this letter to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on the proposed national rulemaking *Definition of "Waters of the United States" Under the Clean Water Act* (79 Fed. Reg. 22188, April 21, 2014). This letter provides comments to EPA and the Corps on this proposed rule (hereinafter, "proposed rule").

We write on behalf of states and territories (hereinafter, "states") who are co-regulators with EPA and the Corps jointly seeking to deliver the nation's environmental protection system of laws, regulations, programs, research, and services. States have many laws that protect waters and wetlands, and implementing the Clean Water Act (CWA) is a fundamental responsibility of states. States have long supported early, meaningful, and substantial state involvement in the development and implementation of environmental statutes and related rules, as stated in ECOS Resolution 11-1. ECOS believes that EPA and the Corps must engage states as co-regulators prior to and during the rulemaking process. While ECOS appreciates the time and effort spent on calls and outreach to states regarding this proposal, some states find that these efforts do not rise to the level of consultation that should occur between the states and federal agencies in developing comprehensive regulations with such significant impact.[1] Recent calls held answered many state questions about the proposed rule, but many questions remain.

The following comments from ECOS cover broad concerns that should be addressed by EPA and the Corps. They do not supersede or alter the comments of any individual state.

[1] Some states find the consultation deficit in this case so serious that it requires the rule be withdrawn and the process restarted with full consultation. Other states believe consultation has been adequate, and do not think delaying the process will produce any significant benefits.

Continuing diligent and frequent communication with sta tes will be critical to developing and implementing an effective final rule on this difficult subject matter. EPA and the Corps must maintain regular forums and contact with states leading to any finalization of the proposed rule. EPA has been th e main communicator and participant in outreach forums. A concern of states throughout the process has been the lack of Corps participation. States ask that the Corps engage meaningfully in the process of developing a final rule as co-regulators.

Uncertainty about the effects of the proposed rule still exists among states, largely due to regional, geographic, and climactic differences around the coun try. Cost impacts may differ from state to state depending on legislative and administrative process differences. States ask EPA and the Corps to consider variations in state implementation costs as app ropriate, and structure any final rule to "provide the maximum flexibility possible that is still consiste nt with underlying statutory objectives" (ECOS Resolution 12-2).

ECOS also requests that EPA and the Corps seek to s ecure federal funding for the states to cover the customary portion of costs associated with any new rule, and consider the availability of funding support in planning for new obligations. States have expressed co ncern that the economic analysis of the proposed rule is not accurate for all states. To the extent that states may have new regulatory obligations under any final rule, ECOS requests the inclusion o f estimates of both state administrative costs and state direct implementation costs in recognition of th e significant and wide-range of activities necessary to implement any new requirements (ECOS Resolution 14-3).

ECOS appreciates any bright line jurisdictional exclusio ns that can be made in a final rule, because they will provide further clarity to regulators. Accordin gly, we recommend EPA and the Corps add to the list of clear exclusions in any final rule.

ECOS also appreciates the EPA and the Corps ' recognition in the proposed rule preamble that the i ssue of state assumption of CWA Section 404 authority is a distinct issue that that should be addressed in a separate process for this specific topic:

> "This proposal does not affect the scope of waters subject to state assumption of the section 404 regulatory program under section 404(g) of the CWA. See CWA section 404(g). The scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language in CWA section 404. States administer approved CWA section 404 programs for ' wa ters of the United States ' within the state, except those waters remaining under Corps jurisdiction pursuant to CWA section 404(g)(1) as identified in a Memorandum of Ag reement 7 between the state and the Corps. 40 CFR 233.14; 40 CFR 233.70(c)(2); 40 C FR 233.71(d)(2). Clarification of waters that are subject to assumption by states or tr ibes or retention by the Corps could be made through a separate process under section 404(g)." (79 Fed. Reg. 22200)

States agree that Section 404 assumption is an impo rtant matter which should be treated separately from any final rule on the definition of Waters of the Unite d States. ECOS supports state assumption of the Section 404 program by interested states (ECOS Resolution 08-3) and recently wrote to EPA requesting that efforts be undertaken to clarify several ambiguities surrounding the assumption process.

States emphasize that a final rule should add such c larity that the need for implementation guidance is minimized. To the extent that guidance is needed, it should be developed with state involvement and published concurrently with any final rule.

If and when the proposed rule is finalized, it may set new standards in some regions for defining jurisdiction under the CWA Section 404 and 402 permitting p rograms. To the extent that an area previously found to be non-jurisdictional has the potential to be found jurisdictional under a new rule, a final rule must be clear regarding how such situations will be handled. A smooth transition between regulatory approaches is critical. In order to red uce litigation and uncertainty, the final rule should describe under what circumstances it will apply to previously made jurisdictional determinations, and also to what universe of currently pending jurisdictional determinations, if any, it will apply.

This letter, though submitted on behalf of states, in no way overrides individual comments made by states - our members and your co-regulators. We appreci ate the opportunity to offer these comments. If you have any questions, please contact Alexandra Dunn, ECOS Executive Director and General Counsel, adunn@ecos.org or 202-266-4929.

Sincerely,

Robert J. Martineau, Jr.
ECOS President
Commissioner, Tennessee Department of Environment and Conservation

cc: ECOS Officers
Sara Parker Pauley (MO), ECOS Water Committee Chair
David Paylor (VA), ECOS Water Committee Vice Chair